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No. 7342

Vol 1844

United States Circuit Court of Appeals

For the Ninth Circuit.

San Francisco Law Library

SANTA MARIA VALLEY RAILROAD COMPANY, a Corporation, and SOUTHERN PACIFIC COMPANY, a Corporation,

Appellants,

vs.

SOLOMON-WICKERSHAM COMPANY, a Corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Arizona.

Filed

FEB 7 - 1934

PAUL P. O'BRIEN,

CLERK

Parkes Printing Company, 545 Sansome Street, San Francisco.

No. 7342

United States

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*Page numbering appearing at the foot of page of original certified Transcript of Record

In the District Court of the United States, in and for the District of Arizona.

No. L-763-Phx.

SOLOMON-WICKERSHAM COMPANY, a corporation,

Plaintiff,

vs.

SANTA MARIA VALLEY RAILROAD COMPANY, a corporation, and SOUTHERN PACIFIC COMPANY, a corporation,

Defendants.

COMPLAINT AT LAW.

Reparation on account of excessive freight rates by Order of Interstate Commerce Commission.

Comes now the above named plaintiff and for cause of action against the above named defendants, complains and alleges:

I.

That at all times hereinafter mentioned the plaintiff, Solomon-Wickersham Company, was and now is a corporation, organized and existing under the laws of the State of Arizona, and doing business under and by virtue of the laws of the State of Arizona;

II.

That at all times hereinafter mentioned the Santa Maria Valley Railroad Company and Southern Pacific Company were, and now are, railroad corporations, engaged in the operation of railroads and railway lines for the transportation of freight in interstate commerce.

III.

That prior to the filing of this complaint this plaintiff filed its petition and complaint with and before the Interstate Commerce Commission of the United States, alleging that the freight rates charged and collected upon 31 car load shipments of sugar, originating at Dyer, Oxnard, *Sprecles,* San Francisco, Crockett and Betteravia, State of California, and destined to the complainant at Bowie, State of Arizona, were unjust, unreasonable and excessive [4] as to the said complainant, and asking for reparation upon said shipments for the amounts that the rates charged by the defendants upon said shipments exceeded the rates which the Commission might determine should have been charged upon said shipments; that thereafter the defendants filed their answers to said complaint with and before the Interstate Commerce Commission, said cause being docketed under Docket No. 14140;

IV.

That said Interstate Commerce Commission made, issued, published and filed its report and findings of fact on March 12, 1928, in which said Commission found that the rates of 86½¢, 96¢ and 96½¢ per hundred pounds which had been charged by said defendants against said plaintiff upon said 31 carload shipments of sugar from said points of origin in California to said point of destination in Arizona were unjust, unreasonable and excessive as to the plaintiff to the extent that they exceeded the following rates:

A rate of 83¢ per hundred pounds from all points of origin in Southern California to Bowie, Arizona, prior to July 1, 1922;

A rate of 93¢ per hundred pounds from all points of origin in Northern California to Bowie, Arizona, prior to July 1, 1922;

A rate of 75¢ per hundred pounds from all points of origin in Southern California to Bowie, Arizona, from and after July 1, 1922;

A rate of 84¢ per hundred pounds from all points of origin in Northern California to Bowie, Arizona, from and after July 1, 1922;

and said Commission in said report and findings further found that the plaintiff herein was entitled to reparation on all said shipments from said points of origin in California to said point of destination in Arizona, and to interest thereon, a copy of which report and findings is hereto attached, marked Exhibit A, and made a part hereof;

V.

That said Commission required and directed that said complainant should comply with Rule V, of the rules and practice of the Interstate Commerce Commission, which rule required a statement of [5] shipments, the dates thereof, the dates on which charges therefor were paid, the car initials and numbers, points of origin, the routes over which the shipments moved, the weights of shipments, the rates charged, the amounts collected, the rates which should have been charged, the amounts which should

have been collected and the difference between the charges assessed and those which the Commission found should have been collected; that in pursuance of said requirements of the Interstate Commerce Commission the complainant, plaintiff herein, did duly and properly certify a statement under said rule and transmitted the same to the defendants herein and the same was thereafter certified to by said defendants, Santa Maria Valley Railroad Company and Southern Pacific Company, and was transmitted by the said defendants to the Interstate Commerce Commission, as required by the rules and regulations of said Commission, a copy of which statement is hereto attached, marked Exhibit B, and made a part hereof;

VI.

That thereafter, and on the 14th day of April, 1930, the said Commission duly made and published its order directing and requiring the defendants herein to pay unto the said complainant, Solomon-Wickersham Company, the following sums, to-wit:

Southern Pacific Company	$1723.01
Southern Pacific Company and Santa Maria Valley Railroad Company	81.10
Total	$1804.11

together with interest thereon at the rate of six per cent per annum from the respective dates of payment of the charges shown on Exhibit B, said

sums to be paid on or before the 31st day of May, 1930; said reparation being on account of the unreasonable rates charged for the transportation of said car load shipments of sugar from said points of origin in California to said point of destination in Arizona, as will more fully appear from a copy of said order hereto attached marked Exhibit C, and made a part hereof; [6]

VII.

That said defendants have failed and refused to pay said reparation or any part thereof, either principal or interest, although request and demand has heretofore been made by the plaintiff upon the defendants for the payment of said reparation;

VIII.

That by reason of said unjust, unreasonable and excessive rates and charges and payment thereof by the plaintiff, and by reason of the refusal of said defendant to pay said reparation awarded by said Commission, the plaintiff has been damaged in the sum of One Thousand Eight Hundred Four and 11/100 ($1,804.11), together with interest thereon at the rate of six per cent per annum from the respective dates of the payment of the charges as shown on Exhibit B, to and including the 31st day of May, 1930, amounting to the sum of Eight Hundred Fifty-seven and 88/100 ($857.88) Dollars, together with interest on total sum of principal and interest, to-wit: $2,661.99, at the rate of six per cent per annum from May 31, 1930, until paid, no part of which has ever been paid;

IX.

That the sum of Five Hundred ($500.00) Dollars is a reasonable attorney's fee to be allowed in this action;

WHEREFORE, plaintiff prays judgment in its favor and against the defendants for the sum of $1,804.11, together with interest thereon at the rate of six per cent per annum from the respective dates of payment up to and including May 31, 1930, amounting to the sum of $857.88, together with interest on the sum of $2,661.99, at the rate of six per cent per annum from May 31, 1930, until paid, together with the sum of $500.00 as and for attorney's fee, and for plaintiff's costs and disbursements in this action, and plaintiff prays that process may issue hereon.

SAMUEL WHITE,
Attorney for Plaintiff. [7]

EXHIBIT A

13146

Interstate Commerce Commission

No. 16742[1]

TRAFFIC BUREAU OF PHOENIX CHAMBER OF COMMERCE ET AL. v. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

Submitted April 6, 1927. Decided March 12, 1928

Rates on sugar, in carloads, from California points to destinations in Arizona and from California and Colorado points to Gallup, N. Mex., found unreasonable. Reasonable rates prescribed and reparation awarded. Original findings in Nos. 14449 and 14140 modified in part. Former reports, 95 I. C. C. 244 and 101 I. C. C. 667.

Roland Johnston, Chas. E. Blaine, Calvin L. Blaine, F. W. Pullen, and R. S. Sawyer for complainants.

James R. Bell, G. H. Muckley, James E. Lyons, H. H. McElroy, A. Burton Mason, J. L. Fielding, Del W. Harrington, E. W. Camp, Platt Kent, F. W. Mielke, and Berne Levy for defendants.

Report of the Commission

CAMPBELL, Chairman:

These cases are related and will be disposed of in one report. Defendants in all of the cases and complainants in Nos. 16742, 16770, and Sub-Nos. 1, 3, 4, 5, and 9 filed exceptions to the proposed report of

the examiners, and defendants replied to complainants' exceptions. The cases were orally argued before us.

In these complaints it is alleged that the rates on sugar, in carloads, from California points to destinations in Arizona and from [8] California, Kansas, and Colorado points to Gallup, N. Mex., were and are unreasonable and in some instances unduly

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[1]This report also comprises No. 16770, Bashford-Burmister Company v. Atchison, Topeka & Santa Fe Railway Company et al.; No. 16770 (Sub-No. 1), Central Commercial Company v. Same; No. 16770 (Sub-No. 2), Wheeler Perry Company v. Santa Maria Valley Railroad Company et al.; No. 16770 (Sub-No. 3), T. F. Miller Company v. Atchison, Topeka & Santa Fe Railway Company et al.; No. 16770 (Sub-No. 4), E. F. Sanguinetti v. Southern Pacific Company et al.; No. 16770 (Sub-No. 5), Arizona Grocery Company v. Atchison, Topeka & Santa Fe Railway Company et al.; No. 16770 (Sub-No. 6), Arizona Wholesale Grocery Company et al. v. Arizona Eastern Railroad Company et al.; No. 16770 (Sub-No. 7), C. N. Cotton Company v. Atchison, Topeka & Santa Fe Railway Company et al.; No. 16770 (Sub-No. 8), Babbitt Brothers Trading Company et al. v. Same; No. 16770 (Sub-No. 9), Wm. H. Dagg Mercantile Company v. Same; No. 17549, Phelps Dodge Mercantile Company v. Same; No. 17549 (Sub-No. 1), Baffert & Leon v. Same; No. 17466, United Verde Extension Mining Company v. Same; No. 17781, Simpson-Ashby Company v. Southern Pacific Company; and Nos. 14140, Solomon-Wickersham Company v. Santa Maria Valley Railroad Company et al., and 14449, Traffic Bureau, Phoenix Chamber of Commerce et al. v. Atchison, Topeka & Santa Fe Railway Company et al., reopened for argument.

prejudicial and preferential. We are asked to prescribe just and reasonable rates for the future and to award reparation. Rates and rate differences are stated in amounts per 100 pounds.

In No. 16742, filed February 9, 1925, and No. 17781, filed informally March 16, 1925, and formally November 27, 1925, reparation is asked, respectively, on shipments from California points to Phoenix to the basis of the rate of 71 cents found reasonable on and after July 1, 1922, in No. 14449, Phoenix Chamber of Commerce v. A., T. & S. F. Ry. Co., 95 I. C. C. 244, reopened for argument with these consolidated cases.

In No. 16770 (Sub-Nos. 1 to 9), filed on various dates from February 17 to May 5, 1925, inclusive, it is alleged that the rates from California points to Prescott, Kingman, Tucson, Clarkdale, Yuma, Bowie, Safford, Globe, Flagstaff, Winslow, and Holbrook, Ariz., and from California, Kansas and Colorado points to Gallup were and are unreasonable. There are also allegations that the rates assailed were and are unduly prejudicial to Tucson and unduly preferential of Phoenix; unduly prejudicial to Bowie, Safford, and Globe and unduly preferential of Phoenix and other points taking the same rate, Lordsburg and Deming, N. Mex., and El Paso, Tex.; unduly prejudicial to Gallup and unduly preferential of Albuquerque, N. Mex., and El Paso; and unduly prejudicial to Kingman, Flagstaff, Winslow, and Holbrook and unduly preferential of Albuquerque and Phoenix.

In Nos. 17549, 17549 (Sub-No. 1), and 17466, filed, respectively, on September 3, 1925, February 9, 1926, and August 24, 1925, the rates from California points to Bisbee, Douglas, Clifton, Tucson, and Clarkdale, Ariz., are alleged to have been and to be unreasonable and also unduly preferential of Phoenix and other points.

No. 16742 and No. 16770 (Sub-Nos. 1 to 9) were heard together. Nos. 17549, 17549 (Sub-No. 1), and 17466 were heard together. The parties in No. 17781 agreed to submission of the case upon the record in Nos. 17549, 17549 (Sub-No. 1), and 17466, except as to proof of payment of freight charges.

Phoenix is the only point in Arizona served by both the Atchison, Topeka & Santa Fe, hereinafter referred to as the Santa Fe, and the Southern Pacific. It is at the terminus of a branch line of the Santa Fe extending south from Ash Fork, Ariz., 194 miles, but California traffic over the Santa Fe is handled over a branch line, known as the Parker cut-off, extending from Cadiz, Calif., to Wickenburg, Ariz., a point on the Ashford-Phoenix branch, approximately 54 miles north of Phoenix. At the time of the hearings traffic from California [9] moving over the Southern Pacific reached Phoenix over the former Arizona Eastern Railroad, which connects with the main line of the Southern Pacific at Maricopa, Ariz., 35 miles south of Phoenix. Since the hearings the Southern Pacific has opened its new line from Wellton, Ariz., to Phoenix. The distances over this new line are 25 miles shorter than via Maricopa. From Los Angeles and San

Francisco the present distances to Phoenix are, respectively, 489 and 800 miles over the Santa Fe and 426 and 896 miles over the Southern Pacific.

Kingman, Williams, Flagstaff, Winslow, Holbrook, and Gallup are on the main line of the Santa Fe. Clarkdale is at the terminus of a branch line of the Santa Fe, 38 miles in length which extends from Drake, Ariz., a point 21 miles south of Ash Fork on the Maricopa-Phoenix line.

Yuma, Tucson, and Bowie are on the main line of the Southern Pacific. Safford and Globe are on a branch line of that carrier extending from Bowie. Clifton is on a branch line of the same carrier extending from Lordsburg. Bisbee and Douglas are served by the so-called southern lines of the Southern Pacific, formerly the El Paso & Southwestern.

The California points of production extend from San Francisco on the north to Los Angeles on the south. They include San Francisco and Crockett, the only two points at which Hawaiian cane sugar is refined, as well as all points at which beet sugar is produced. All California refining points take the same rates to Arizona destinations.

In Maier & Co. v. Southern Pacific Co., 29 I. C. C. 103, decided January 6, 1914, a rate on sugar from Los Angeles and Los Alamitos, Calif., to Benson, Ariz., of 60 cents, minimum 36,000 pounds, was prescribed. This was the contemporaneous rate to El Paso, a point more distant than Benson on the same line. The 60-cent rate was established generally to main-line Southern Pacific and Santa Fe

points in Arizona and New Mexico, and the San Francisco rate was made 10 cents higher.

In Fourth Section Violations in Rates on Sugar, 31 I. C. C. 511, we denied authority to continue rates on sugar from San Francisco and other sugar-producing points in California to Trinidad, Colo., and other points east thereof, which were lower than the rates concurrently applicable on like traffic to intermediate points on the line of the Santa Fe, and also denied authority to the Southern Pacific, El Paso & Southwestern, and Chicago, Rock Island & Pacific to continue lower rates on sugar from the points of production described to the Missouri River than the rates concurrently applicable to intermediate points west of Tucumcari, N. Mex. In addition [10] to making substantial reductions in the rates in connection with the minimum of 36,000 pounds, the carriers on November 15, 1914, established rates, with a minimum of 60,000 pounds, from all California producing points to practically all Arizona points on a basis 5 cents lower than the rates from Los Angeles to the same destinations upon the lower minimum.

In Arizona Corporation Commission v. A., T. & S. F. Ry. Co., 34 I. C. C. 158, the rates from California to Phoenix and Prescott were found to be unreasonable to the extent that they exceeded the rates to the main-line junction points by more than 5 cents. As a result, on May 1, 1916, the rates from California to Phoenix and Prescott became 60 cents, minimum 60,000 pounds, and 65 cents, minimum 36,000 pounds. On June 25, 1918, the main-line

rates were increased 25 per cent to 69 and 75 cents, respectively, and the Phoenix and Prescott rates became 75 and 81.5 cents. Subsequently a flat increase of 22 cents was substituted for the percentage increase and the rates to main-line points became 77 and 82 cents on November 25, 1919, and to Phoenix and Prescott 82 and 87 cents on February 18, 1920.

On February 29, 1920, the carriers canceled the rates to main-line and branch-line points under the lower minimum weight published in connection with roads under Federal control and, as to such roads, increased the Phoenix and Prescott rate under the minimum of 60,000 pounds to 83.5 cents. This cancellation, as to nonfederal lines, was found justified in Sugar from California Points to Arizona, 58 I. C. C. 737.

On August 26, 1920, the rates on sugar from California, minimum 60,000 pounds, became 96.5 cents to main-line points and $1.045 to Phoenix and Prescott. In Phoenix Chamber of Commerce v. Director General, 62 I. C. C. 412, decided June 22, 1921, the Phoenix rate was found unreasonable to the extent that it exceeded 96.5 cents, and reparation was awarded on that basis. On June 27, 1921, the carriers reduced the main-line rates to 96 cents, and on September 17, 1921, that rate was established to both Phoenix and Prescott. All of these rates were reduced on July 1, 1922, to 86.5 cents.

In United Verde Mining Co. v. A., T. & S. F. Ry. Co., 88 I. C. C. 5, the rates on classes and commodities, including sugar, from California, among

other origin territories, to Clarkdale were found unreasonable to the extent that they exceeded the contemporaneous rates to Drake, and on October 16, 1922, the rate on sugar from California to Clarkdale was reduced from $1.16 to 86.5 cents.

In Sugar Cases of 1922, 81 I. C. C. 448, fourth-section relief authorized in Fourth Section Violations in Rates on Sugar, supra, permitting lower rates to Chicago, Ill., and other points in the Middle [11] West, than to intermediate points, was withdrawn. In the revision following this decision the rate to Chicago, minimum 80,000 pounds, became 84 cents, and this rate was established at intermediate points, including Gallup and main-line Southern Pacific and Santa Fe points in Arizona, but in connection with a minimum of 60,000 pounds. The same rate and minimum were established to Phoenix, Prescott, and Clarkdale.

In our original report in No. 14449 we again considered the rate from California points to Phoenix and found it to have been and to be unreasonable to the extent that it exceeded 79 and 71 cents, respectively, prior and subsequent to July 1, 1922. Reparation was awarded on that basis. The 71-cent rate was established to Phoenix and to intermediate points on the Southern Pacific and on the route of the Santa Fe over the Parker cut-off, effective February 25, 1925. In our original report in No. 14140, Solomon-Wickersham Co. v. S. M. V. R. R. Co., 101 I. C. C. 667, reopened and here before us on argument, the rate on sugar from California points to Bowie was found to have been and to be unreason-

able to the extent that it exceeded 83 and 75 cents, respectively, before and after July 1, 1922. Reparation was awarded on that basis. The reduced rate was established to Bowie and to Tucson, an intermediate point, effective October 27, 1925. The reduction to Bowie was 9 cents, and on the date named the Southern Pacific made reductions of the same amount to Safford and Globe, resulting in rates of 80.5 and 85.5 cents, respectively. No change was made in the Clifton rate of 94.5 cents.

Summarized, the present rates, minimum 60,000 pounds, are 71 cents to Yuma and Phoenix, 75 cents to Tucson and Bowie, 80.5 cents to Safford, 84 cents to Kingman, Williams, Flagstaff, Winslow, Holbrook, Prescott, Clarkdale, Bisbee, Douglas, and Gallup, 85.5 cents to Globe, and 94.5 cents to Clifton.

The general transportation conditions from California to Arizona are fully discussed in the cases cited and also in Arizona Corporation Commission v. A. E. R. R. Co., 113 I. C. C. 52, and will not be further discussed here. The latter case has since been reopened. In Arizona Cattle Growers Asso. v. A. Ry. Co., 101 I. C. C. 181, division 4 approved of prescribed rates on cattle, in carloads, from points in Arizona to points in California which were approximately 20 per cent higher than the corresponding rates for like distances in Oklahoma and Texas. The same level of rates was approved or prescribed in that case from branch-line as from main-line points in Arizona.

In Nos. 16742, 16770, and 16770 (Sub-Nos. 1 to 9) counsel asks reparation on shipments to Phoenix on

the basis of 71 cents, and contends that rates to the other destinations should be graded like [12] the rate to Bowie prescribed in the first report in No. 14149, or else that there should be reasonable groupings. In Nos. 17549, 17549 (Sub-No. 1), and 17466 counsel contends that the origin group should be divided into two parts, the first to include Los Angeles, Dyer, Los Alamitos, San Pedro, and Oxnard, and the second San Francisco, Betteravia, Spreckles, Tracy, Alvarado, and Crockett. The principal counsel in the latter cases is also counsel for complainants in No. 16770 (Sub-Nos. 6, 7, and 8). The rates now suggested from the proposed southern group are 54 cents to Phoenix, Tucson, and Clarkdale, 59 cents to Bisbee, and 64 cents to Clifton, and rates 10 cents higher from the proposed northern group.

The rate of 71 cents to Phoenix prescribed in the original report in No. 14449 was based on a distance of 625 miles, which is approximately one-half of the sum of the short-line distances from Los Angeles and San Francisco. Reference was made in that report to the fact that under the distance scale on sugar prescribed in Memphis-Southwestern Investigation, 77 I. C. C. 473, for application in the general territory comprising Louisiana west of the Mississippi River, Arkansas, and southern Missouri, the rate for 625 miles is 58 cents. The rate of 71 cents prescribed is about 121 per cent of 58 cents. The rates proposed by complainants are lower than 121 per cent of the Memphis-Southwestern scale, and in justification thereof complainants point to the fact

that the minimum weight prescribed in connection with that scale is 36,000 pounds, as compared with 60,000 pounds under the rates assailed. In Oklahoma Traffic Asso. v. A. G. S. R. R. Co., 113 I. C. C. 635, the Memphis-Southwestern scale was prescribed on sugar from New Orleans, La., and points in Louisiana taking the same rates, and from Sugarland and Texas City, Tex., to points in Oklahoma, subject to a minimum of 60,000 pounds.

Defendants are opposed to a disturbance of the origin grouping and to grading of rates at destination. They contend that because of the competitive situation the present origin and destination groupings are of advantage to producers and distributors of sugar. However, if the rates are to be graded at destination they favor breaking up the origin blanket into two groups. Defendants subscribe to a basis of rates from California to Arizona which is about 121 per cent of the rates for the same distances under the Memphis-Southwestern scale, provided that the rates to Arizona points are based upon the weighted-average haul.

As stated, the only California points at which cane sugar is refined are San Francisco and Crockett. The southern California distributors of beet sugar stock a limited amount of cane sugar in order to fill orders for mixed carloads containing certain varieties of sugar [13] not obtainable at beet-sugar refineries. The production of beet sugar in California during 1925 was as follows:

Producing Point	Quantity
	Tons
Dyer	9,095
Los Alamitos	2,010
Oxnard	15,310
Betteravia	18,559
Spreckles	30,066
Tracy	8,297
Alvarado	9,580
Total	92,917

The production at the southern California points of Dyer, Los Alamitos, and Oxnard was 28.43 per cent of the total production for the State during 1925. In addition there was a substantial movement of sugar by water to San Pedro, Calif.

During the past several years, due to blight, drought, and the use for other purposes of land formerly planted in beets, there has been a substantial diminution in the amount of beet sugar produced in southern California and, as a consequence, a reduction in the number of refineries. The following table, giving movements from California refineries on the Southern Pacific to destinations in Arizona and New Mexico and to El Paso, shows that there has been a substantial reduction, both in the volume of movement from southern California to the territory of destination described and in the ratio such tonnage bears to the tonnage from northern California:

	Northern California			Southern California		
	Cars	Tons	Per cent	Cars	Tons	Per cent
Year 1921	187	5,920	24	265	8,519	76
Year 1922	188	5,920	39.4	265	8,423	70.6
Year 1923	247	7,754	72.9	67	2,129	27.1
Year 1924	313	9,856	86	44	1,415	14
Year 1925	504	15,615	95.5	23	714	4.5

In addition to the above there were shipments of sugar from San Francisco over the Santa Fe to destinations on its own line west of Albuquerque. In 1925 they amounted to 107 cars, weighing 3.029 tons. This additional tonnage changes the percentages for 1925 to 96.3 per cent from northern California and 3.7 per cent from southern California. Of the total of 611 cars from northern California, 227 moved from San Francisco and 370 from Crockett. The weight of the shipments from these two points aggregated 18,490 tons. Only 14 cars moved from other northern California points, of which 11 moved from Spreckles and 3 from Betteravia.

We have upon this record no serious contention from producers, distributors, or consumers that a breaking up of the present exten- [14] sive origin and destination groupings would be detrimental to their interests. Bearing in mind the length of time during which the present California group has existed and the fact that until recent years the movement has been substantial from both northern and southern California, we do not find that group as such to have been or to be unreasonable; but in view

of the fact that most of the movement now is from two of the most distant points of shipment, an origin group approximately 500 miles in length is no longer justified. A more reasonable adjustment for the future would seem to require the breaking up of the origin territory into two groups, the northern group extending from San Francisco and Crockett on the north to Spreckles on the south, and the southern group extending from Betteravia on the north to Dyer on the south.

Since the hearings in these cases we have decided Consolidated Southwestern Cases, 123 I. C. C. 203, in which new distance scales of rates were prescribed for application on classes and commodities generally throughout the Southwest. The scale on sugar prescribed in those cases, hereinafter referred to as the southwestern scale, is 30 per cent of the first-class rates therein prescribed and will apply in connection with a minimum weight of 60,000 pounds. The following table shows the average short-line distances from the southern and northern groups to points or groups of destination and compares the rates proposed by certain of complainants with rates on basis of 120 per cent of the southwestern scale for like distances:

	From southern group			From northern group		
	Distance	Complainants' proposed rates	120% of southwestern rates	Distance	Complainants' proposed rates	120% of southwestern rates
	Miles	Cents	Cents	Miles	Cents	Cents
From Group 1 to Yuma, Ariz.	267	40	45.5	637	50	72
From Group 2 to Kingman, Ariz.	388	47	56.5	645	57	73
From Group 3 to Phoenix, Ariz.	467	55	61	749	65	79
From Group 4 to—						
Tucson, Ariz.	519	.....	.....	847	.....	.....
Prescott, Ariz.	526	.....	.....	782	.....	.....
Williams, Ariz.	527	.....	.....	783	.....	.....
Flagstaff, Ariz.	561	.....	.....	818	.....	.....
Clarkdale, Ariz.	563	.....	.....	820	.....	.....
Group average	539	55	65	810	65	83
From Group 5 to—						
Winslow, Ariz.	619	.....	.....	876	.....	.....
Bisbee, Ariz.	628	.....	.....	956	.....	.....
Bowie, Ariz.	634	.....	.....	961	.....	.....
Douglas, Ariz.	643	.....	.....	971	.....	.....
Holbrook, Ariz.	652	.....	.....	909	.....	.....
Group average	635	59	72	935	69	89
From Group 6 to—						
Safford, Ariz.	674	60	74.5	1,001	70	92.5
From Group 7 to—						
Gallup, N. Mex.	747	.....	.....	1,004	.....	.....
Clifton, Ariz.	753	.....	.....	1,081	.....	.....
Globe, Ariz.	758	.....	.....	1,085	.....	.....
Group average	752	64	79	1,057	74	95

No. 16670 (Sub-No. 7) brings in issue the reasonableness of the rates from Colorado and Kansas refineries to Gallup, and contains a prayer for reparation on shipments subsequent to March 31, 1923. Prior to June 25, 1918, the rate on sugar from transcontinental Group E, which includes New Orleans, to Pacific coast points was 85 cents, minimum 60,000 pounds, and this rate applied as maximum from Kansas and Colorado points. The general increases and reduction resulted in rates from Colorado and Kansas, respectively, to Arizona points on the Santa Fe of $1.195 and $1.28, the difference resulting from general increases of 25 and 33 1/3 per cent, respectively, from Colorado and Kansas on August 26, 1920. At the time of the hearing the fifth-class rate of $1.145 was applicable on sugar from Colorado refineries to Gallup. At that time a commodity rate of 75 cents applied from Colorado points to Albuquerque, and on August 1, 1925, the present commodity rate of 84 cents, minimum 60,000 pounds, was established from the same points to Gallup. The present rate to Albuquerque is 76 cents, and the same rate applies from Denver and Pueblo, Colo., to El Paso. To Fort Worth, Tex., the rate is 72 cents, minimum 36,000 pounds.

The record fails to show any movement, actual or prospective, from Kansas, and the rates from that State will not be further considered.

The Colorado points of origin are shown by complainant as including Denver, Fort Collins, Greeley, Holly, Lamar, Longmont, Loveland, Las Animas, Lupton, Rocky Ford, Swink, and Windsor. The Santa Fe, which is the only carrier serving the Colorado group named as defendant herein, carries

rates to points on its line in Arizona and New Mexico only from Holly, Lamar, Las Animas, Rocky Ford, and Swink. The average distance from the group to Gallup is shown by complainants as 625 miles. Complainant in No. 16670 (Sub-No. 7) showed only seven shipments from Colorado to Gallup since March 31, 1923, six from Swink, and one from Rocky Ford.

The rates herein prescribed under section 1 will remove any undue prejudice which may exist in the rates assailed, and no findings with respect to the allegations under section 3 are necessary.

The evidence shows that all of the complainants, except the C. N. Cotton Company, made or received shipments of sugar as described, and paid and bore the charges thereon.

Defendants call attention to the fact that in our original report in No. 14449 we awarded reparation on shipments which moved to Phoenix on a rate 0.5 cent less than the rate prescribed as reasonable by us from and to the same points in Phoenix Chamber of Com- [16] merce v. Director General, supra, referred to as the First Phoenix case, and that the period of reparation in the former case extended back approximately four months prior to the date when the latter case was decided. Defendants contend that they should not be required to pay reparation on shipments which moved under rates approved or prescribed by us. We have several times announced that the doctrine of res adjudicata is not applied by us. Goss v. Director General, 73 I. C. C. 649. We reserve the right,

upon a more comprehensive record, to modify our previous findings, whether in the same or a previous case, upon matters directly in issue before us as to which it clearly appears that our previous findings would not accord substantial justice under the laws which we administer. We have such a case here. For the first time the record before us is comprehensive in the evidence which it contains bearing upon the reasonableness of the rates assailed. Upon this record we reach the conclusion that the rate prescribed in the first Phoenix case, during the period embraced in these complaints, was unreasonable and that a lower rate would have been reasonable during that period. If we are within our authority in finding that a lower rate would have been reasonable, then it must follow that shippers who paid the freight charges at the higher rate paid charges which were unreasonable, and are entitled to reparation upon adequate proof that they paid or bore such charges.

We find that the assailed rate, minimum 60,000 pounds, from Holly and other Santa Fe points in Colorado grouped therewith to Gallup was, is, and will be unreasonable to the extent that it exceeded, exceeds, or may exceed 72 cents. We further find that the assailed rates, minimum 60,000 pounds, from California points were, are, and will be unreasonable to the extent that they exceeded, exceed, or may exceed, respectively, the following, in cents per 100 pounds:

Prior to July 1, 1922, to Phoenix 79 cents from the Southern California group and 81 cents from the northern California group and to Bowie 83

cents from the southern California group and 93 cents from the northern California group; on and between July 1, 1922, and the effective date of the rates herein prescribed for the future, from the southern California group and the northern California group, respectively, *66* and 66 cents to Yuma, 68 and 69 cents to Kingman, 71 and 73 cents to Phoenix, 73 and 77 cents to Prescott, Williams, Tucson, Flagstaff, and Clarkdale, 75 and 84 cents to Winslow, Holbrook, Bisbee, Bowie, and Douglas, 77 and 87 cents to Safford, and 79 and 89 cents to Gallup, Clifton, and Globe; and for the future as follows: [17]

To—	From southern California group	From northern California group
	Cents	Cents
Yuma, Ariz.	46	66
Kingman, Ariz.	57	69
Phoenix, Ariz.	61	73
Tucson, Ariz.	65	77
Prescott, Ariz.	65	77
Williams, Ariz.	65	77
Flagstaff, Ariz.	65	77
Clarkdale, Ariz.	65	77
Winslow, Ariz.	72	84
Bisbee, Ariz.	72	84
Bowie, Ariz.	72	84
Douglas, Ariz.	72	84
Holbrook, Ariz.	72	84
Safford, Ariz.	75	87
Gallup, N. Mex.	79	89
Clifton, Ariz.	79	89
Globe, Ariz.	79	89

We further find that complainants, except the C. N. Cotton Company, made shipments as described at the rates herein found to have been unreasonable; that they paid and bore the charges thereon and were damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the rates herein found to have been reasonable; and that they are entitled to reparation, with interest. Complainants should comply with Rule V of the Rules of Practice. No reparation orders have been issued in Nos. 14449 and 14140, and complainants in those cases should submit to the carriers new statements in compliance with Rule V referred to.

Our original order in No. 14449 and the order of division 3 in No. 14140 will be modified in conformity with the foregoing conclusions, and appropriate orders for the future will be entered in other cases disposed of in this report.

TAYLOR, Commissioner, concurring in part:

I dissent from so much of this report as finds the rates unreasonable in the past and awards reparation.

COMMISSIONER PORTER did not participate in the disposition of this case. [18]

ORDERS.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 12th day of March, A. D. 1928

No. 16770

Bashford-Burmister Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Bay Transport Company

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No. 16770 (Sub-No. 1)

Central Commercial Company

v.

Same

No. 16770 (Sub-No. 2)

Wheeler Perry Company

v.

Santa Maria Valley Railroad Company and Southern Pacific Company

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No. 16770 (Sub-No. 3)

T. F. Miller Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Bay Transport Company

No. 16770 (Sub-No. 4)

E. F. Sanguinetti

v.

Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Bay Transport Company [19]

No. 16770 (Sub-No. 5)

Arizona Grocery Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Bay Transport Company

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No. 16770 (Sub-No. 6)

Arizona Wholesale Grocery Company

v.

Arizona Eastern Railroad Company; Pacific Elcetric Railway Company; Santa Maria Valley Railroad Company; and Southern Pacific Company

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No. 16770 (Sub-No. 7)

C. N. Cotton Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Pacific Electric Railway Company; Rio Grande, El Paso and Santa Fe Railroad Company; Santa Maria Valley Railroad Company; and Southern Pacific Company

No. 16770 (Sub-No. 8)

Babbitt Brothers Trading Company; Arizona Stores Company; Babbitt Brothers Company; and Babbitt Brothers

v.

Same

No. 16770 (Sub-No. 9)

Wm. H. Dagg Mercantile Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Bay Transport Company

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No. 17549

Phelps Dodge Mercantile Company

v.

The Atchison, Topeka & Santa Fe Railway Company; El Paso & Southwestern Railroad Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Southern Pacific Company [20]

No. 17549 (Sub-No. 1)

Baffert & Leon

v.

The Atchison, Topeka & Santa Fe Railway Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Southern Pacific Company

No. 17466

United Verde Extension Mining Company

v.

Same

No. 17781

Simpson-Ashby Company

v.

Southern Pacific Company

These cases being at issue upon complaints, as amended, and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before June 11, 1928, and thereafter to abstain, from publishing, demanding, or collecting rates for the transportation of sugar, in carloads, from points in California to points in Arizona, referred to in the next succeeding paragraph hereof, and to Gallup, N. Mex., and from points in Colorado, referred to in the second succeeding paragraph hereof, to Gallup, which shall exceed the rates hereinafter prescribed.

It is further ordered, That said defendants, according as they participate in the transportation, be,

and they are hereby, notified and required to establish, on or before June 11, 1928, upon notice to this commission and to the general public by not less than 15 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of sugar, in carloads, from the following California groups, as defined in the report made a part hereof, to the Arizona and New Mexico destinations named below, rates, minimum weight 60,000 pounds, which shall not exceed the following, in cents per 100 pounds: [21]

To—	From southern California group	From northern California group
	Cents	Cents
Yuma, Ariz.	46	66
Kingman, Ariz.	57	69
Phoeniz, Ariz.	61	73
Tucson, Ariz.	65	77
Prescott, Ariz.	65	77
Williams, Ariz.	65	77
Flagstaff, Ariz.	65	77
Clarkdale, Ariz.	65	77
Winslow, Ariz.	72	84
Bisbee, Ariz.	72	84
Bowie, Ariz.	72	84
Douglas, Ariz.	72	84
Holbrook, Ariz.	72	84
Safford, Ariz.	75	87
Gallup, Ariz.	79	89
Clifton, Ariz.	79	89
Globe, Ariz.	79	89

It is further ordered, That said defendants in No. 16670 (Sub-No. 7), according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before June 11, 1928, upon notice to this commission and to the general public by not less than 15 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of sugar, in carloads, from Holly, Lamar, Rocky Ford, and Swink, Colo., and other points on the Atchison, Topeka & Santa Fe Railway in Colorado taking the same rates, to Gallup, N. Mex., a rate which shall not exceed 72 cents per 100 pounds, minimum weight 60,000 pounds.

And it is further ordered, That these orders shall continue in force until the further order of the commission.

SUPPLEMENTAL ORDERS

No. 14449

Traffic Bureau of the Phoenix Chamber of Commerce; Haas-Baruch & Company; Hall-Pollock Company; The Melczer Company; and James A. Dick Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Arizona Eastern Railroad Company

No. 14140

Solomon-Wickersham Company

v.

Santa Maria Valley Railroad Company and Southern Pacific Company

These cases having been reopened for oral argument jointly with No. 16742, Traffic Bureau of the Phoenix Chamber of Commerce et al. v. A., T. & S. F. Ry. Co. et al., and cases consolidated therewith, and such oral argument having been had, and the commission having, on the date hereof, made and filed a new report containing its find- [22] ings of fact and conclusions thereon, which said report, together with the previous reports herein, 95 I. C. C. 244 and 101 I. C. C. 667, are hereby referred to and made a part hereof:

It is ordered, That the order entered in No. 14449 on January 6, 1925, and the order entered in No. 14140 on July 17, 1925, be, and they are hereby, modified so that the second and third paragraphs thereof will read, respectively, as follows:

It is ordered, That the above-named defendants in No. 14449, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before June 11, 1928, and thereafter to abstain, from publishing, demanding, or collecting rates for the transportation of sugar, in carloads, from points in California to Phoenix, Ariz., which shall exceed the rates prescribed in the next succeeding paragraph hereof.

It is further ordered, That said defendants, according as they participate in the transportation, be,

and they are hereby, notified and required to establish, on or before June 11, 1928, upon notice to this commission and to the general public by not less than 15 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of sugar, in carloads, rates to Phoenix, Ariz., minimum weight 60,000 pounds, which shall not exceed 61 cents per 100 pounds from points in the southern California group, as defined in the report of this date made a part hereof, and 73 cents per 100 pounds from points in the northern California group, as defined in the said report.

It is ordered, That the above-named defendants in No. 14140, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before June 11, 1928, and thereafter to abstain, from publishing, demanding, or collecting rates for the transportation of sugar, in carloads, from points in California to Bowie, Ariz., which shall exceed the rates prescribed in the next succeeding paragraph hereof.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before June 11, 1928, upon notice to this commission and to the general public by not less than 15 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of sugar, in carloads, rates to Bowie, Ariz., minimum weight 60,000 pounds, which shall

37

AMENDED CLAIM NO. 3034 OF SOLOMON WICKERSHAM COMPANY UNDER THE DECISION OF THE INTERSTATE COMMERCE COMMISSION IN DOCKET NO. 14140, COVERING SHIPMENTS OF SUGAR FROM DYER, OXNARD, SPRECKLES, SAN FRANCISCO AND CROCKETT, CALIFORNIA TO BOWIE, ARIZONA; ROUTED VIA SOUTHERN PACIFIC COMPANY.

66

Date of Shipment	Date of Delivery or Tender of Delivery	Date Charges Paid	Car Initials	Car Number	Weight	AS CHARGED Rate	AS CHARGED Amount	SHOULD BE Rate	SHOULD BE Amount	Reparation on basis of the Commission's Decision
June 29, 1923	July 5, 1923	July 7, 1923	Q	120446	60450	96½	522.89	75	453.38	69.51
July 6, 1921	July 11, 1921	July 11, 1921	GH	68863	68863	96½	664.53	83	571.56	92.97
" 15, 1921	" 21, 1921	" 22, 1921	GH	35826	80600	96½	777.79	83	668.98	108.81
Aug. 6, 1921	Aug. 10, 1921	Aug. 12, 1921	PRR	39397	81084	96½	782.46	83	673.00	109.46
Sept. 5, 1921	Sept. 10, 1921	Sept. 13, 1921	Q	120688	80625	96	774.00	83	669.19	104.81
Nov. 26, 1921	Nov. 25, 1921	Dec. 3, 1922	BO	172093	64835	96	622.42	83	538.13	84.29
Mar. 17, 1922	Mar. 24, 1922	Mar. 24, 1922	SP	35582	81039	96	777.97	83	672.67	105.35
Apr. 20, 1922	Apr. 24, 1922	Apr. 24, 1922	HTC	11701	80600	96	773.76	83	668.98	104.78
Aug. 24, 1922	Aug. 28, 1922	Aug. 31, 1922	SP	63173	100750	86	871.49	75	755.63	115.86
Sept. 3, 1923	Sept. 7, 1923	Sept. 8, 1923	SP	16556	90713	86½	784.67	75	680.35	104.32
Apr. 26, 1923	May 3, 1923	May 7, 1923	H&TC	11687	64204	86½	555.36	84	539.31	16.05
None	May 31, 1922	May 31, 1922	SP	36701	86035	96	833.94	93	800.13	25.81
Mar. 21, 1923	Mar. 25, 1923	Mar. 3, 1923	SP	66919	80696	86½	699.75	84	679.55	20.22
June 14, 1923	June 21, 1923	June 21, 1923	B&O	97451	61200	86	529.38	84	514.08	15.30
July 17, 1923	July 23, 1923	July 26, 1923	SP	35884	80947	86½	700.19	84	679.95	20.24
Sept. 13, 1923	Sept. 21, 1923	Sept. 22, 1923	SP	21661	67180	86½	581.10	84	564.31	16.79
Nov. 20, 1923	Nov. 27, 1923	Nov. 30, 1923	NYC	226117	60840	86½	526.27	84	511.06	15.21
Dec. 3, 1923	Dec. 10, 1923	Dec. 15, 1923	WAB	79870	60468	86½	523.05	84	507.93	15.12
July 1, 1922	July 7, 1922	July 8, 1922	SP	88376	60600	86½	524.19	84	509.04	15.15
Aug. 11, 1922	Aug. 21, 1922	Aug. 23, 1922	SP	18179	84542	86½	731.29	84	710.15	21.14
Nov. 1, 1922	Nov. 9, 1922	Nov. 10, 1922	SP	20679	91770	86½	793.84	84	770.87	22.97
Dec. 28, 1922	Jan. 4, 1923	Jan. 5, 1923	TNO	34899	91354	86½	790.56	84	767.71	22.85
Feb. 6, 1923	Feb. 14, 1923	Feb. 15, 1923	SP	87024	61357	86½	530.57	84	515.23	15.34
Feb. 26, 1923	Mar. 5, 1923	Mar. 8, 1923	SP	85774	80680	86½	697.88	84	677.71	20.17
Apr. 28, 1923	May 5, 1923	May 5, 1923	DGT	24548	80849	86½	699.34	84	679.13	20.21
Aug. 6, 1923	Aug. 10, 1923	Aug. 10, 1923	RG	156860	60450	86½	522.89	75	453.38	69.51
TOTAL							$17,883.58		$16,231.34	$1,652.24

The Undersigned hereby certifies that this statement has been checked against the records of this company and found correct.

(DATE) Portland, Ore. OCT 22 1930

SOUTHERN PACIFIC COMPANY, Collecting Carrier-Defendant,

By _____ Auditor.

July 26, 1928.

SOLOMON WICKERSHAM COMPANY,
Bowie, Arizona,
BY: CHAS. E. BLAINE,
Commerce Counsel,
417-423 Home Builders Bldg.,
Phoenix, Arizona.

AMENDED CLAIM NO. 3034 OF SOLOMON "ICKERSHAM COMPANY UNDER THE DECISION OF THE INTERSTATE COMMERCE COMMISSION IN DOCKET NO. 14111, COVERING SHIPMENTS OF SUGAR FROM BETTERAVIA, CALIFORNIA, TO BOWIE, ARIZONA, ROUTED VIA SOUTHERN PACIFIC AND SANTA MARIE VALLEY RAILROAD.

Date of ** Shipment	Date of Delivery or Tender of Delivery	Date Charges Paid	Car Initials	Car Number	Weight	AS CHARGED Rate	AS CHARGED Amount	SHOULD BE Rate	SHOULD BE Amount	Reparation on basis of the Commission's Decision
Sept. 14, 1923	Sept. 21, 1923	Sept. 19, 1923	SP	34691	70525	86	610.04	75	528.94	81.10

The undersigned hereby certifies that this statement has been checked against the records of this company and found correct.

Date.

SOUTHERN PACIFIC COMPANY,
Collecting Carrier, Defendant,

By: _____, Auditor.
AUDITOR OF FREIGHT ACCOUNTS

SANTA MARIE VALLEY RAILROAD,

By: _____, Auditor.

SOLOMON "ICKERSHAM COMPANY,
Bowie, Arizona.

By: CHAS. E. BLAINE,
Interstate Counsel,
Rooms 417-423 Home Builders',
Phoenix, Arizona.

July 26, 1928.

CLAIM NO. 5220 OF SOLOMON ICKERSHAM COMPANY UNDER THE DECISION OF THE INTERSTATE COMMERCE COMMISSION IN DOCKET NO. 14140, COVERING SHIPMENTS OF SUGAR FROM OXNARD, CALIFORNIA, TO BOVIE, ARIZONA, ROUTED VIA THE SOUTHERN PACIFIC COMPANY.

6 Date of Shipment	Date of Delivery or Tender of Delivery	Date Charges Paid	Car Initials	Car Number	Weight	AS CHARGED Rate	AS CHARGED Amount	SHOULD BE Rate	SHOULD BE Amount	Reparation on basis Commission's Decision
April 4, 1921	April 11, 1921	April 12, 1921	SP	35632	85600	96½	777.79	83	668.98	108.81
May 17, 1921	May 23, 1921	May 23, 1921	M&STL	20128	70525	96½	680.57	83	585.36	95.21
June 8, 1921	June 14, 1921	June 17, 1921	GH	5142	60450	96½	583.34	83	501.74	81.60
June 12, 1922	June 17, 1922	June 17, 1922	SP	26987	85600	96	628.80	83	543.65	85.15
TOTAL							$2,670.50		$2,299.73	$370.77

The undersigned hereby certifies that this statement has been checked against the records of this company and found correct.

Date

SOUTHERN PACIFIC COMPANY,
Collecting Carrier Defendant

Auditor

AUDITOR OF FREIGHT ACCOUNTS

SOLOMON ICKERSHAM COMPANY,
Bovie, Arizona.

By: CHAS. E. BLAINE, Commerce Counsel,
Rooms 417-423 Home Builders' Bldg.,
Phoenix, Arizona.

July 20, 1928.

EXHIBIT C.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washignton, D. C., on the 14th day of April, A. D. 1930

No. 14140

Solomon-Wickersham Company

v.

Santa Maria Valley Railroad Company et al.

It appearing, That on March 12, 1928, the commission, entered its report in the above-entitled proceeding, which report is hereby referred to and made a part hereof, and this proceeding now coming on for further consideration on the question of reparation, and the parties having filed agreed statements with respect to the shipments in question, showing among other things, the dates on which payment of the charges assailed was made; we find that complainant is entitled to awards of reparation from the defendants named in the following table, in the amounts set opposite their respective names, with interest.

Defendants	Amounts
Southern Pacific Company	1723.01
Southern Pacific Company and Santa Maria Valley Railroad Company	81.10

It is therefore ordered, That the defendants, named in each of the groups shown in the above table, be, and they are hereby, authorized and di-

rected to pay unto the complainant, Solomon-Wickersham Company, on or before May 31, 1930, the amounts set opposite their respective names in said table, with interest thereon at the rate of six per cent per annum, from the respective dates of payment of the charges assailed shown in the aforesaid agreed statements, as reparation on account of unreasonable rates charged for the transportation of numerous carloads of sugar from California points to Bowie, Arizona.

By the commission.

GEORGE B. McGINTY,
Secretary.

[Seal Interstate Commerce Commission]

A true copy

GEORGE B. McGINTY,
Secretary. [28]

[Endorsed]: Filed Nov. 12, 1930. [29]

D. C. Form No. 45

SUMMONS.

United States District Court

Tucson ..... Division ..... District of Arizona.

L-763 Phx

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Marshal of the ..... District of Arizona, GREETING:

YOU ARE HEREBY COMMANDED, That you summon SOUTHERN PACIFIC COMPANY, a

corporation, late of your District, if it may be found therein, so that it be and appear within 20 days after service of this summons before the United States District Court for the District of Arizona, at Tucson, next to answer to a complaint filed in this Court wherein Solomon-Wickersham Company, a corporation, is plaintiff, and Southern Pacific Company, et al are defendants.

And have you then and there this writ.

WITNESS, the Honorable F. C. Jacobs, United States District Judge at Phoenix, this 12th day of November, A. D. 1930.

[Seal] J. LEE BAKER,
Clerk.
By H. F. Schlittler,
Deputy Clerk. [31]

Form No. 282

RETURN OF SERVICE OF WRIT.

United States of America,
Tucson, District of Arizona—ss.

Received Writ Nov. 13th, 1930 at Tucson, Ariz.

I hereby certify and return that I served the annexed Summons and a Copy of Complaint on the therein-named A. L. Pixley, Freight agent for The Southern Pacific Railroad Company, Tucson, Arizona, by handing to and leaving a true and correct copy thereof, to which was attached a copy of the Complaint therein to A. L. Pixley————per-

sonally at Tucson, Ariz. in said District on the 14th day of November, 1930, A. D. 19.....

G. A. MAUK,
U. S. Marshal.
By Tom Mills, Deputy.

[Endorsed]: Filed Nov. 14, 1930. [32]

[Title of Court and Cause—No. L-548-Tucson.)

MINUTE ENTRY OF WEDNESDAY, DECEMBER 24, 1930

L-548

SOLOMON-WICKERSHAM COMPANY, a corporation,

Plaintiff,

vs.

SANTA MARIA VALLEY RAILROAD COMPANY, a corporation, et al,

Defendants.

ORDER TRANSFERRING CASE TO PHOENIX DIVISION.

Pursuant to stipulation of respective counsel, and the approval of the Honorable F. C. Jacobs, United States District Judge at Phoenix,

IT IS ORDERED that this case be and the same is transferred to the Phoenix Division of this Court for further proceedings. [35]

[Title of Court and Cause—No. L-763-Phoenix]

MINUTE ENTRY OF MONDAY,
SEPTEMBER 12, 1932

L-763

SOLOMON-WICKERSHAM COMPANY,
a corporation,

Plaintiff,

vs.

SANTA MARIA VALLEY RAILROAD COMPANY, a corporation, and SOUTHERN PACIFIC COMPANY, a corporation,

Defendants.

Messrs. White & Wilson, by Samuel White, Esquire, appear as counsel for the plaintiff. Messrs. Baker & Whitney, by Alexander B. Baker, Esquire, appear as counsel for the defendants.

Plaintiff's Motion to Set for Trial is now regularly called, and

IT IS ORDERED that this case be, and the same is hereby set for trial at Phoenix, Tuesday, October 11, 1932, at the hour of ten o'clock A. M. [39]

[Title of Court and Cause.]

MINUTE ENTRY OF MONDAY,
SEPTEMBER 26, 1932.

L-763

Upon motion of Alexander B. Baker, Esquire, of counsel for the defendants, and with the consent of Samuel White, Esquire, of counsel for plaintiff,

IT IS ORDERED that the defendants be allowed to file an Amended Answer to plaintiff's Complaint. [40]

[Title of Court and Cause.]

AMENDED ANSWER TO COMPLAINT.

Now come the defendants in the above entitled action, and by leave of the Court first had and obtained, file this, their joint and several amended answer to the complaint on file therein, wherein and whereby said defendants admit, allege and deny as follows:

I.

Admit the allegations of paragraphs I, II, III and VII of said complaint.

II.

Answering paragraph IV of said complaint, defendants deny that said Interstate Commerce Commission at any time found that said rates of 86½ cents, 96 cents, and/or 96½ cents per 100 pounds, as referred to in said paragraph were or was unjust and/or unreasonable, and/or excessive as to said plaintiff, or in any other respect, either to the extent alleged or to any extent whatsoever, and deny further that said rates, and/or the freight charges accruing thereunder, or either or any of them, were or was or are or is in fact unjust and/or unreasonable, and/or in violation of the Interstate Commerce Act, or otherwise or in any manner un-

lawful; but defendants admit that said Commission undertook to find whether [41] said rates had been unreasonable and/or unjust and/or excessive to the extent that they exceeded 93 cents per 100 pounds upon shipments originating at points in northern California prior to July 1, 1922, and destined to Bowie, Arizona, and to the extent that they exceeded 84 cents per 100 pounds, upon shipments originating at points in northern California, from and after July 1, 1922, and destined to Bowie, Arizona, and to the extent that they exceeded 83 cents per 100 pounds upon shipments originating at points in southern California, prior to July 1, 1922, and destined to Bowie, Arizona, and to the extent that they exceeded 75 cents per 100 pounds, upon shipments originating at points in southern California from and after July 1, 1922, and destined to Bowie, Arizona; admit further that said Commission undertook to find that said plaintiff was entitled to reparation upon its said shipments moving under said rates from and to said points of origin and destination; but defendants allege that said report and/or findings of said Commission, and each thereof, as to each and all of said shipments of said plaintiff which had been made and delivered prior to the rendition and issuance of said report and/or findings, were and was and are and is beyond the jurisdiction of said Commission and void, as is hereinafter more particularly set forth.

III.

Answering paragraph V of said complaint, defendants admit that, substantially as alleged in said paragraph, said Commission undertook to require and direct said plaintiff herein to comply with Rule V of its Rules of Practice; admit further that said plaintiff undertook to prepare statements purporting to show, with respect to each of the plaintiff's said shipments, the information required by said Rule V; admit that said statements were thereafter transmitted to the defendants; but deny that the same were thereafter certified by said defendants or any of them; deny further that the copies of said statements which are annexed [42] to and form Exhibit B to the complaint on file herein, are correct, insofar as the same undertake to set forth any liability whatsoever for reparation, on the part of said defendants or either or any of them.

IV.

Answering paragraph VI of said complaint, defendants admit that, substantially as alleged in said paragraph, said Commission undertook to make an order of the character described in said paragraph; but defendants allege that said purported order was and is in all respects beyond the jurisdiction of said Commission and without statutory authority and void, as is hereinafter more particularly set forth.

V.

Answering paragraph VIII of said complaint, defendants deny that by reason of said alleged unjust

and/or unreasonable and/or excessive rates and/or charges, or by reason of the refusal of defendants to pay said reparation, or otherwise, plaintiff has been damaged, either in the sum of $1804.11, or any other sum or amount mentioned in said complaint, either with interest or otherwise; or that said plaintiff has otherwise been damaged, in any other or different sum or sums whatsoever.

VI.

Answering paragraph IX of said complaint, defendants deny that the sum of $500.00 or any other sum whatsoever, is or would be a reasonable attorney's fee to be allowed in this action.

VII.

Defendants further show and allege that said purported order of said Interstate Commerce Commission, referred to in paragraph VI of said complaint, insofar as it authorizes, directs and/or commands the payment of reparation upon the plaintiff's said shipments, was and is beyond the power and jurisdiction of said Commission, and without any statutory warrant or authority whatsoever; [43] and in this behalf defendants allege that the rates which were charged and collected upon plaintiff's said shipments, as set forth in said complaint, had previously been formally approved, and declared to be reasonable, by said Commission, and/or were less in amount than rates which had been specifically approved and declared by said Commission to be rea-

sonable, after formal investigation; and that said approved rates remained in full force and effect, subject only, in certain instances, to changes ordered, directed and/or approved by the Director-General of Railroads and/or said Commission itself, during all times mentioned in the complaint before the Commission and in the complaint on file herein; that said rates were applied upon plaintiff's said shipments, and were charged and collected, pursuant to the authority and approval of said Commission; and that each and all of said rates, and/or the charges thereunder accruing upon plaintiff's said shipments, was and were and is and are just, and reasonable, and in full conformity with all of the requirements of the Interstate Commerce Act.

WHEREFORE, defendants pray:

(1) That the Court order judgment to be entered, against said plaintiff, and in favor of defendants, dismissing said complaint;

(2) That defendants be allowed their costs herein incurred;

(3) For such other, further and different relief as may be proper in the premises.

Dated September 23, 1932.

BAKER & WHITNEY,
Attorneys for Defendants.

JAMES E. LYONS
BURTON MASON
Of Counsel.

[44]

State of California,
City and County of San Francisco.—ss.

G. L. KING, being first duly sworn, deposes and says:

That he is Assistant Secretary of Southern Pacific Company, a corporation, one of the defendants in the above entitled proceeding, and makes this verification for and on behalf of said defendants; that he has read the foregoing amended answer and knows the contents thereof, and the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters, he believes the same to be true.

G. L. KING.

Subscribed and sworn to before me this 23d day of September, 1932.

[Seal] FRANK HARVEY,
Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Sept. 26, 1932. [45]

[Title of Court and Cause—Consolidated Cases.]

WAIVER OF JURY TRIAL.

IT IS HEREBY STIPULATED AND AGREED, by and between the parties to this cause that a jury trial shall be waived, and that the case

shall be tried before a judge of this court without the aid or intervention of a jury.

Dated this 26 day of September, 1932.

SAMUEL WHITE,
Attorney for Plaintiff.
BAKER & WHITNEY,
Attorneys for Defendants.

[Endorsed]: Filed Sep 26 1932. [46]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF TUESDAY,
OCTOBER 11, 1932.

IT IS ORDERED that the Order heretofore entered herein, setting this case for trial this date, be vacated and that this case be continued and reset for trial Wednesday, October 12, 1932, at the hour of ten o'clock, A. M. [47]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF WEDNESDAY,
OCTOBER 12, 1932.

This case comes on regularly for trial this day, before the Court sitting without a Jury, a Jury having been expressly waived upon the written stipulation of counsel heretofore filed herein.

Samuel White, Esquire, appears for plaintiff.

Messrs. Baker & Whitney, counsel for Defendants, appear by Burton Mason, Esquire, and Thomas G. Nairn, Esquire.

Upon motion of Burton Mason, Esquire,

IT IS ORDERED that Gerald Duffy, Esquire, be entered as associate counsel for the defendants.

Upon motion of Samuel White, Esquire,

IT IS ORDERED that Frank L. Snell, Jr., Esquire, be entered as associate counsel for plaintiff.

L. O. Tucker, is now sworn to report the evidence in this case.

Burton Mason, Esquire, now moves that Findings of Fact and Conclusions of Law be filed by the Court, at the conclusion of the trial hereof, and

IT IS ORDERED that said Motion be, and the same is hereby granted. [48]

Plaintiff's Case:

The following plaintiff's Exhibits are now admitted in evidence:

1. Report, Interstate Commerce Commission, No. 16742.

2. Order, Interstate Commerce Commission, No. 14140, payment of Reparations.

3. Rule V Statements, Interstate Commerce Commission, being Exhibits "A", "B", "C" to the Complaint.

L. G. Reif is now sworn and examined on behalf of plaintiff.

Plaintiff's Exhibit No. 4, Statement of Rates, is now admitted in evidence.

Counsel for plaintiff now moves for a continu-

ance, for the purpose of introducing further oral testimony, and

IT IS ORDERED that said Motion be, and the same is hereby denied, to which ruling and Order of the Court, the plaintiff excepts.

Whereupon, the plaintiff rests.

Burton Mason, Esquire, now moves for a nonsuit; dismissal of the Complaint, and for Judgment for the defendants, and

IT IS ORDERED that said motion be, and the same is hereby denied, to which ruling and order of the Court, the defendants except.

Defendants' Case:

J. L. Fielding, is now sworn and examined on behalf of the defendants.

The following defendants' Exhibits are now admitted in evidence:

"A" Report and Order, Interstate Commerce Commission, Docket No. 6806.

"B" Report and Order Interstate Commerce Commission, Docket No. 11532. [49]

"C" Report and Order, Interstate Commerce Commission, Docket No. 11442.

"D" Report and Order, Interstate Commerce Commission, Docket No. 13139.

"E" Statement of Carload Rates—History.

"F" Statement of Rates assessed.

"G" Statement of Rates assessed.

"H" Authority No. 8016.

"I" Letter from Director General of Railroads, dated August 15, 1919.

And the defendants rest.

Both sides rest.

Burton Mason, Esquire, now renews Motion for Judgment for the Defendants, and

IT IS ORDERED that said Motion be, and the same is hereby denied, to which ruling and Order of the Court, the defendants except.

Thereupon, IT IS ORDERED that this case be submitted upon briefs, and by the Court taken under advisement. [50]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF THURSDAY, OCTOBER 13, 1932

Samuel White, Esquire, and Frank L. Snell, Jr., Esquire, appear as counsel for plaintiff. Burton Mason, Esquire, and Gerald Duffy, Esquire, appear as counsel for the defendants.

Frank L. Snell, Jr., Esquire, now moves to reopen this case for the purpose of introducing the testimony of Mr. Blaine, and

IT IS ORDERED that said Motion be, and the same is hereby denied, to which ruling and Order of the Court, the plaintiff excepts.

Upon stipulation of respective counsel,

IT IS ORDERED that this case be set for oral argument, Monday, October 24, 1932, at the hour of ten o'clock, A. M. [51]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF MONDAY,
OCTOBER 17, 1932

IT IS ORDERED that the Order heretofore entered herein, setting this case for oral argument upon the Law and Facts, Monday, October 24, 1932, at the hour of ten o'clock, A.M., be, and the same is hereby vacated, and that this case be continued to be reset for oral argument upon stipulation of counsel. [52]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF FRIDAY,
OCTOBER 21, 1932

No appearance is made on behalf of the Plaintiffs. Messrs. Baker & Whitney, by Alexander B. Baker, Esquire, and Messrs. Chalmers, Fennemore & Nairn, by Thomas G. Nairn, Esquire, appear as counsel for the defendants.

IT IS ORDERED that this case be set for oral argument upon the Law and Evidence, Monday, November 14, 1932, at the hour of ten o'clock, A. M. [53]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF MONDAY,
NOVEMBER 14, 1932

Samuel White, Esquire, and Messrs. Elliott & Snell, by Frank L. Snell, Jr., Esquire, appear as counsel for plaintiffs. Messrs. Chalmers, Fenne-

more & Nairn, by T. G. Nairn, Esquire; Messrs. Baker & Whitney, by Alexander B. Baker, Esquire; Gerald Duffy, Esquire, and Burton Mason, Esquire, appear as counsel for the defendants.

Pursuant to Trial heretofore had herein, argument is now had upon the Law and Facts.

Frank L. Snell, Jr., Esquire, opens said argument on behalf of the plaintiffs, and Burton Mason, Esquire, thereafter argues on behalf of the defendants.

And, thereupon, at the hour of 12:10 o'clock, P. M., IT IS ORDERED that further argument herein be continued to the hour of 1:00 o'clock, P. M., this date, to which time counsel are excused.

Subsequently, at the hour of 1:00 o'clock, P. M., respective counsel being present pursuant to recess, further [54] argument is had by Burton Mason, Esquire, and Gerald Duffy, Esquire.

And, thereupon, at the hour of 2:25 o'clock, P. M., IT IS ORDERED that further argument herein be continued to the hour of 2:30 o'clock, P. M., this date, to which time counsel are excused.

Subsequently, at the hour of 2:30 o'clock, P. M., respective counsel being present pursuant to recess, argument is now closed by Frank L. Snell, Jr., Esquire, of counsel for plaintiffs. [55]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF THURSDAY, DECEMBER 29, 1932

These cases having heretofore been tried before the Court sitting without a Jury, a Jury having

been expressly waived upon Stipulation of the parties in writing, submitted upon oral argument, and upon briefs, and by the Court taken under advisement, and the Court having duly considered the same, and being fully advised in the premises, the Court finds in favor of the plaintiffs and against the defendants, and

IT IS ORDERED that counsel for plaintiffs prepare Findings of Fact and Conclusions of Law, and that exceptions be entered on behalf of the defendants, and

IT IS FURTHER ORDERED that these cases be continued for hearing to determine the amount of attorneys' fees to be awarded counsel for plaintiffs. [56]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF MONDAY,
JANUARY 9, 1933

Messrs. Elliott & Snell, by Frank L. Snell, Jr., Esquire, appear as counsel for plaintiffs. Messrs. Baker & Whitney, by Alexander B. Baker, Esquire, appear as counsel for the defendants.

Upon motion of said counsel for plaintiffs,

IT IS ORDERED that these cases be set for trial upon the matter of attorneys' fees, Tuesday, January 17, 1933, at the hour of ten o'clock, A. M. [57]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF TUESDAY,
JANUARY 17, 1933

Upon agreement of counsel, these cases are consolidated and come on regularly for hearing this date, upon the matter of attorneys' fees.

Messrs. Elliott & Snell, by Frank L. Snell, Jr., Esquire, and Samuel White, Esquire, by George T. Wilson, Esquire, appear as counsel for plaintiffs.

Messrs. Chalmers, Fennemore & Nairn, by T. G. Nairn, Esquire; Messrs. Baker and Whitney, by Alexander B. Baker, Esquire, and A. B. Mason, Esquire, appear as counsel for the defendants.

Upon stipulation of counsel, the statement of Samuel White is read into the record on behalf of the plaintiffs.

Upon motion of Frank L. Snell, Jr., Esquire,

IT IS ORDERED that George T. Wilson, Esquire, be entered as associate counsel for plaintiffs.

Frank L. Snell, Jr., is sworn and examined on behalf of plaintiffs. [58]

A. B. Mason is sworn and examined on behalf of the defendants.

Both sides rest.

Whereupon, the cause is now submitted to the Court, and the Court having duly considered the same, and being fully advised in the premises,

IT IS ORDERED that plaintiffs' attorneys fees be fixed at twenty per cent (20%) of the amount of Judgment in each case, and that an exception be entered on behalf of the defendants. [59]

[Title of Court and Cause—Consolidated Cases.]

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

Now comes the plaintiff, above-named, by its attorney, Samuel White, and hereby requests the court to make the following findings of fact and conclusions of law in this action.

Dated this 1st day of February, 1933.

SAMUEL WHITE
Attorney for Plaintiff. [60]

[Title of Court and Cause—Consolidated Cases.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause coming on for trial at the regular term of said court, and on the 11th day of October, 1932, and having been tried before the court, a jury having been legally waived by the respective parties hereto, plaintiff appearing by its attorney, Samuel White, and the defendants appearing by their attorneys, Baker and Whitney, Chalmers, Fennemore and Nairn, James E. Lyons, Burton Mason and Gerald E. Duffy; and the respective parties herein having offered both oral and documentary evidence in support of their respective pleadings herein, and the trial of said matters having been concluded on the 13th day of October, 1932, and the court, pursuant to stipulation of the parties, on the 17th day of January, 1933, having heard oral testimony offered by the respective parties hereto as to the matter of attorney's fees to be allowed plaintiff's

attorney and the court having been duly requested by the parties hereto to make, enter and file special findings of fact and conclusions of law in said cause prior to rendering judgment; and the court having considered said evidence and said argument of counsel, and being fully advised in the premises, does hereby make and find the following as its findings [61] of fact and conclusions of law, constituting the decision of the court in this action:

FINDINGS OF FACT

I.

That plaintiff is, and was at all times mentioned in plaintiff's complaint, a corporation, organized under the laws of the State of Arizona, and doing business under and by virtue of the laws of the State of Arizona and qualified to do business in said state.

II.

That at all times mentioned in plaintiff's complaint the defendants, Santa Maria Valley Railroad Company and Southern Pacific Company, were, and now are, railroad corporations, engaged in the operation of railroad lines for transportation of freight in interstate commerce, and that each of said corporations was, and now is, a connecting carrier between which there was, and now is, an agreement for a joint line and arrangement for continuous carriage of interstate commerce shipments over their respective lines.

III.

That between the 29th day of July, 1921, and the 3rd day of December, 1923, inclusive, there was shipped by the plaintiff Solomon-Wickersham Company, over the lines of the defendants, Santa Maria Valley Railroad Company and Southern Pacific Company 31 carload shipments of sugar; that said shipments originated at Dyer, Oxnard, Spreck*l*es, San Francisco, Crockett and Betteravia, California, and were destined to the plaintiff at Bowie, Arizona; that said shipments are severally and collectively set forth in plaintiff's Exhibit "B", attached to plaintiff's complaint filed herein, to which reference is hereby made the same as if said exhibit, and the contents thereof, were [62] a part of these findings of fact, and which exhibit correctly shows in detail the points of origin and the points of destination; the dates upon which said shipments were made; the dates upon which the charges for transportation thereof were paid; the car initials and numbers in which said shipments were loaded and transported; the weights of said shipments; the rates charged and the amount collected thereon; the rates and amounts subsequently found by the Interstate Commerce Commission to be reasonable and which should have been charged, and the difference between the rates charged and the rates which said commission found should have been charged, said last mentioned amounts being the amount of reparation claimed by the plaintiff and allowed by said commission, with respect to each of said shipments.

IV.

That the defendants, Santa Maria Valley Railroad Company and Southern Pacific Company, charged the plaintiff, Solomon-Wickersham Company, and said plaintiff was compelled to, and did, pay to said defendants on all said shipments from said points of origin in California to said point of destination in Arizona, between said dates, freight charges in the sums of 86½¢, 96¢, and 96½¢ per hundred pounds; that all said shipments were made on true bills-of-lading from said points of origin to said point of destination.

V.

That the plaintiff, prior to the commencement of this action, filed its petition and complaint with and before the Interstate Commerce Commission of the United States, alleging that the rates and charges on the above mentioned shipments were unjust and unreasonable as to the plaintiff, and that thereafter the defendants filed their answers with and before said commission, said matter being docketed before said commission under Docket No. 14140. [63]

VI.

That the Interstate Commerce Commission issued and filed its Findings of Fact in said matter on the 12th day of March, 1928, which findings are reported in Vol. 140 I. C. C. Page 171; that said commission found that the said rates of 86½¢, 96¢, and 96½¢ per hundred pounds charged and col-

lected by said defendants on said shipments from said points of origin to said points of destination were unreasonable as to the plaintiff to the extent that they exceeded the following rates: 83¢ per hundred pounds from Southern California to Bowie, Arizona; 93¢ per hundred pounds from Northern California to Bowie, Arizona; 75¢ per hundred pounds from Southern California to Bowie, Arizona, 84¢ per hundred pounds from Northern California points to Bowie, Arizona, from and after July 1, 1922, up to and including the 3d day of December, 1923; that said commission further found in said findings that the plaintiff had been damaged in the amount of the difference between said rates paid by plaintiff and said rates found by said commission in said proceedings to have been reasonable, and that plaintiff was entitled to reparation therefor on all said shipments, with interest thereon.

VII.

That the plaintiff has duly complied with all the requirements of said Interstate Commerce Commission as to the proof necessary for the amount of said reparation.

VIII.

That on the 14th day of April, 1930, said Interstate Commerce Commission, in Docket No. 16742 and causes consolidated therewith, including said Docket No. 14140, duly made and published its order, directing and requiring the defendants herein to pay to the plaintiff herein the sum of $1,804.11, [64] together with interest thereon at the rate of

six per cent per annum from the respective dates of payment of the charges collected by the defendants from plaintiff, said sum to be paid on or before the 31st day of May, 1930, said sum being the amount of reparation on account of said unreasonable rate charged and collected by said defendants for transportation of said 31 carload shipments of sugar.

IX.

That the defendants failed and refused to comply with said order to pay said reparation, or any part thereof, though request was made by the plaintiff upon said defendants for payment of same.

X.

That said freight rates charged and collected, as aforesaid, were unjust, unreasonable and excessive as to said plaintiff, and in violation of the Interstate Commerce Act of February 4, 1885, and Acts of Congress amendatory thereof.

XI.

That the just and reasonable freight rates which should have been charged on all said 31 carload shipments from said points of origin in California to said point of destination in Arizona, from and after July 1, 1922, and up to and including the 3d day of December, 1923, were 93¢ and 84¢ per hundred pounds from points in Northern California and 83¢ and 75¢ per hundred pounds from points in Southern California.

XII.

That by reason of the said unreasonable rates and charges, and the payment thereof by plaintiff, and by reason of the refusal of the defendants to pay said reparation in pursuance of said order made by said commission, plaintiff has [65] been damaged by said defendants in the sum of $1,804.11, together with interest thereon at the rate of six per cent per annum from the respective dates of payment, as shown on Exhibit "B", attached to plaintiff's complaint, down to and including the 31st day of May, 1930, amounting to the sum of $857.88; together with interest at the rate of six per cent per annum on the total sum of principal and interest, to-wit: $2,661.99, from said 31st day of May, 1930, until paid.

XIII.

That plaintiff herein has been compelled to employ an attorney-at-law to prosecute the present action to collect said reparation so awarded by said commission, and that 20% of the total amount found due, including principal and interest, is a reasonable sum to be allowed as attorney's fees.

CONCLUSIONS OF LAW.

I.

That said order of the Interstate Commerce Commission dated April 14, 1930, made and entered in that certain proceeding before said commission, entitled Traffic Bureau of Phoenix Chamber of Commerce, et al, vs. Atchison, Topeka & Santa Fe

Railway Company, et al, Docket No. 16742, and causes consolidated therewith, including Docket No. 14,140, which said order required said defendants to pay to the plaintiff herein certain sums of money as set forth in said order and in plaintiff's complaint, was, and is, a legal, valid and binding order and was made and entered by said Interstate Commerce Commission in said cause, and was within the power and jurisdiction conferred on said Interstate Commerce Commission in said cause by law, and that in the making of said order said commission acted within its jurisdiction and power. [66]

II.

That the rates of 86½¢, 96¢, and 96½¢, per hundred pounds charged the plaintiff by the defendants from Dyer, Oxnard, Spreckles, San Francisco, Crockett and Betteravia, California, to Bowie, Arizona, between the 29th day of July, 1921, and the 3d day of December, 1923, inclusive, on said 31 carload shipments of sugar, as shown on Exhibit "B" attached to plaintiff's complaint, were found by the Interstate Commerce Commission, in said proceedings, Docket No. 16742, and causes consolidated therewith, including Docket 14140, unreasonable to the extent that said rates exceeded 93¢, 84¢, 83¢, and 75¢ per hundred pounds from said points of origin to said points of destination between said dates, and that the reasonable rate which should have been charged the plaintiff on account of said shipments over defendants' lines were 93¢ and 84¢ per hundred pounds from Northern California, and

83¢ and 75¢ per hundred pounds from Southern California, to Bowie, Arizona from and after July 1, 1922.

III.

That by reason of said unreasonable charges the plaintiff has been damaged and the defendants, Santa Maria Valley Railroad Company and Southern Pacific Company, are jointly and severally indebted to the plaintiff in the sum of $1,804.11, together with interest thereon at the rate of six per cent per annum from the respective dates of payment of said charges, as shown on said Exhibit "B" attached to plaintiff's complaint, down to and including the 31st day of May, 1930, amounting to the sum of $857.88, and interest on said total sum of principal and interest, to-wit $2,661.99, from said 31st day of May, 1930, until paid said principal and interest [67] amounting to the sum of $....., as of this date, and the further sum of 20% of the total amount of said indebtedness, including principal and interest, as and for attorney's fees, amounting to the sum of $..... and said defendants, and each of them, became and are jointly and severally indebted to the plaintiff in said total sum of principal and interest, and attorney's fees of $..... together with plaintiff's costs and disbursements herein expended, and that plaintiff is entitled to judgment therefor.

Dated this.....day of February, 1933.

.....

Judge. [68]

Received Copy of the within documents this 1st day of February, 1933.

BAKER & WHITNEY &
LAWRENCE L. HOWE,
Attorney for

[Endorsed]: Filed Feb. 1, 1933. [69]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF THURSDAY, FEBRUARY 2, 1933

Upon motion of Alexander B. Baker, Esquire, of counsel for the defendants,

IT IS ORDERED that the defendants be allowed twenty (20) days from and after this date, within which to file Proposed Amendments and Additions to Plaintiffs' Findings of Fact and Conclusions of Law. [70]

[Title of Court and Cause—Consolidated Cases.]

DEFENDANTS' PROPOSED AMENDMENTS AND ADDITIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW REQUESTED BY PLAINTIFF.

The defendants in the above-named cause propose amendments and additions to the special findings of fact and conclusions of law requested by plaintiff therein as follows:

1. Defendants propose that the plaintiff's said requested findings and conclusions be amended by

eliminating the preamble thereto, for the reason that the same is not in accordance with the record and the law, and for the further reason that the same is not sufficiently clear, definite and concise; and defendants request that the preamble to the special findings of fact and conclusions of law requested by defendants, annexed hereto, be substituted therefor.

2. Defendants propose that plaintiff's requested findings be amended by eliminating paragraph II thereof, for the reason that the same is not in accordance with the record, and is not sustained or supported by the evidence, and is contrary to the evidence and the record herein; and defendants request that paragraph 2 of the special findings of fact requested by defendants, annexed hereto, be substituted therefor.

3. Defendants propose that plaintiff's requested findings be [71] amended by eliminating paragraph III thereof, for the reason that the same is not in accordance with the evidence, and for the further reason that the same is not sufficiently clear, definite and concise; and defendants request that paragraph 3 of the special findings of fact requested by defendants, annexed hereto, be substituted therefor.

4. Defendants propose that plaintiff's requested findings be amended by eliminating paragraph IV thereof, for the reason that the same is not sustained or supported by the evidence, nor in accord with the evidence and the law, and for the further

reason that the same is not sufficiently clear, definite and concise.

5. Defendants propose that plaintiff's requested findings be amended by eliminating paragraph V thereof, for the reason that the same is not sustained or supported by the evidence, nor in accordance with the evidence or the law, and for the further reason that the same is not sufficiently clear and definite; and defendants request that paragraph 4 of the special findings of fact requested by defendants, annexed hereto, be substituted therefor.

6. Defendants propose that plaintiff's requested findings be amended by eliminating paragraph VI thereof, for the reason that the same is not sufficiently clear and definite, and is not sustained or supported by the evidence, nor in accord with the evidence and the law; and defendants request that paragraph 5 of the special findings of fact requested by defendants, annexed hereto, be substituted therefor.

7. Defendants propose that plaintiff's requested findings be amended by eliminating paragraph VII thereof, for the reason that the same is not sustained or supported by the record or the evidence, and is contrary to the evidence and the law, and for the further reason that the same is not sufficiently clear and definite; and defendants request that paragraph 6 of the special findings of fact requested by defendants, annexed hereto, be substituted [72] therefor.

8. Defendants propose that plaintiff's requested

findings be amended by eliminating paragraph VIII thereof, for the reason that the same is not sustained or supported by the record or the evidence, and is contrary to the evidence and the law, and for the further reason that the same is not sufficiently clear, definite and concise; and defendants request that paragraph 7 of the special findings of fact requested by defendants, annexed hereto, be substituted therefor.

9. Defendants propose that plaintiff's requested findings be amended by eliminating paragraphs X and XI thereof, for the reason that the same are not, or is either or any of them, sustained or supported by the evidence, and for the further reason that each and both of said paragraphs are wholly contrary to the evidence and the law; and defendants request that paragraph 16 of the special findings of fact requested by defendants, annexed hereto, be substituted therefor.

10. Defendants propose that plaintiff's requested findings be amended by eliminating the paragraphs XII and XIII thereof, for the reason that the same are not, nor is either of them, sustained or supported by the evidence, and for the further reason that the same are, and each of them is, contrary to the evidence and the law.

11. The defendants propose, as further amendments and additions to the findings of fact requested by the plaintiff, that the Court make findings of fact as set forth in the paragraphs numbered 9, 10, 11, 12, 13, 14 and 15, of the special findings of fact requested by defendants annexed hereto.

12. Defendants propose that the conclusions of law requested by plaintiff be amended by eliminating paragraph I thereof, for the reason that the same is not sustained by the evidence or the law, and is contrary to the evidence and the law; and defendants re- [73] quest that paragraph 2 of the conclusions of law requested by defendants, annexed hereto, be substituted therefor.

13. Defendants propose that the conclusions of law requested by plaintiff be amended by eliminating paragraph II thereof, for the reason that the same is not sufficiently clear and definite, and for the further reason that the same is not sustained or supported by the evidence or the law, and is contrary to the evidence and the law; and defendants request that paragraph 1 of the conclusions of law requested by defendants, annexed hereto, be substituted therefor.

14. Defendants propose that the conclusions of law requested by plaintiff be amended by eliminating paragraph III thereof, for the reason that the same is contrary to the evidence and the law, and not sustained by the evidence and the law, and for the further reason that the same is not sufficiently clear and definite; and defendants request that paragraphs 3 and 4 of the conclusions of law requested by defendants, annexed hereto, be substituted therefor.

WHEREFORE, defendants pray that the findings of fact and conclusions of law requested by plaintiff be amended as hereinbefore proposed, and that in addition to said amendments, the Court do

make and find special findings of fact and conclusions of law, as set forth in the document entitled "Special Findings of Fact and Conclusions of Law Requested by Defendants", which is annexed hereto and is herewith filed and presented to the Court; and that in accordance therewith the Court do render and enter judgments in the above causes, in favor of the defendants and against the plaintiffs.

DATED: February 21, 1933.

CHALMERS, FENNEMORE & NAIRN,
BAKER & WHITNEY,
GERALD E. DUFFY,
JAMES E. LYONS,
BURTON MASON,
Attorneys for Defendants. [74]

Received copy of within the 21st day of February, 1933.

SAMUEL WHITE,
Atty for Pltf.

[Endorsed]: Filed Feb. 21, 1933. [75]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF SATURDAY, APRIL 15, 1933

Messrs. Elliott & Snell, by Frank L. Snell, Jr., Esquire, and Samuel White, Esquire, appear as counsel for plaintiffs. Messrs. Baker & Whitney, by Alexander B. Baker, Esquire, appear as counsel for the defendants.

Upon motion of counsel for plaintiffs.

IT IS ORDERED that Findings of Fact and Conclusions of Law, be set for hearing and settlement, Friday, May 12, 1933, at the hour of ten o'clock, A. M. [87]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF FRIDAY, MAY 12, 1933

Findings of Fact and Conclusions of Law requested by Plaintiff, Defendants' Proposed Amendments and Additions thereto, and Special Findings of Fact and Conclusions of Law Requested by Defendants, come on regularly for hearing this day.

Messrs. Elliott & Snell, by Frank L. Snell, Jr., Esquire, appear for the plaintiff. Burton Mason, Esquire, and Gerald Duffy, Esquire, appear for the Defendants.

Argument is now had by respective counsel, and

IT IS ORDERED that the preamble proposed in the Special Findings of Fact and Conclusions of Law requested by Defendants be allowed and adopted and that Plaintiff's exception thereto be allowed; that Plaintiffs' Proposed Findings of Fact 1, 6, 7, 8, 9, 10 as amended, 11, 12, and 13 be adopted, to each of which rulings and order of the Court the Defendants except and that said Plaintiffs' Proposed Findings of Fact 2, 3, 4 and 5 be rejected, to each of which rulings and order of the Court the Plaintiff excepts; [88]

That Defendants' Special Findings of Fact 2, 3 as amended and 4 be adopted, to each of which rulings and order of the Court the plaintiff excepts, and that said Defendants' Special Findings of Fact 1, 5, 6, 7, 8, 16, 9, 10, 11, 12, 13, 14 and 15 be rejected, to each of which rulings and order of the Court the Defendants except;

That Plaintiff's Conclusions of Law be adopted in lieu of Conclusions of Law proposed by Defendants, to which ruling and order of the Court the Defendants except.

IT IS FURTHER ORDERED that the Findings of Fact and Conclusions of Law as adopted be engrossed, that Judgment for the Plaintiff be entered in accordance therewith, and that an exception for Defendants be allowed to said Order for Judgment. [89]

[Title of Court and Cause—Consolidated Cases.]

STIPULATION

To Include Certain Exhibits in Findings of Fact and Conclusions of Law by Reference.

It is stipulated and agreed that the Court in making its Findings of Fact and Conclusions of Law herein, may incorporate by reference "Exhibit B" attached to plaintiff's complaint (also referred to as Rule V statement), with the same force and effect as if the said Exhibit and Statement were physically incorporated in said Findings

of Fact and Conclusions of Law.

Dated this 5th day of June, 1933.

SAMUEL W. WHITE
FRANK L. SNELL, JR.
Attorneys for Plaintiff
BAKER & WHITNEY
Attorneys for Defendants.

[Endorsed]: Filed Jun 8, 1933. [90]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF THURSDAY, JUNE 8, 1933

Findings of Fact and Conclusions of Law having been presented to the Court in due time, together with the Proposed Amendments thereto, and settled by the Court on the 12th day of May, 1933, the Court now

ORDERS that the said Findings of Fact and Conclusions of Law be filed this 8th day of June, 1933, notwithstanding Rule 31 of this Court.

Thereupon, said Findings of Fact and Conclusions of Law are filed and entered as follows: to-wit: [91]

[Title of Court and Cause—Consolidated Cases.]

MEMORANDUM OF COSTS AND DISBURSEMENTS

DISBURSEMENTS

Marshal's Fees	$ 2.00
Clerk's Fees	10.00
Attorney fees allowed by the Court as provided by law	626.56
Examiner's Fees	
Witness Fees	
Certified copies from I.C.C. of Rule "V" Statements, report and findings, and order of reparation	3.90
Total	$ 646.46

United States of America
District of Arizona—ss.

Samuel White being duly sworn, deposes and says: That he is the Attorney for the plaintiff in the above-entitled cause, and as such has knowledge of the facts relative to the above costs and disbursements. That the items in the above memorandum contained are correct; that the said disbursements have been necessarily incurred in the said cause, and that the services charged therein have been actually and necessarily performed as therein stated.

SAMUEL WHITE

Subscribed and sworn to, before me, this 20 day of May, A. D. 1933.

[Seal] RUE VERA MORRIS
Notary Public.

My commission expires Feb. 28, 1937.

To Baker & Whitney, Chalmers, Fennemore & Nairn, James E. Lyons, and Burton Mason, attorneys for defendants.

You will please take notice that on Tuesday the 13th day of June, A. D. 1933, at the hour of ten o'clock A. M. Plaintiff will apply to the Clerk of said Court to have the within memorandum of costs and disbursements taxed pursuant to the rule of said Court, in such case made and provided.

SAMUEL WHITE
Attorney for Plaintiff.

Service of within memorandum of costs and disbursements and receipt of a copy thereof acknowledged, this 10 day of June, A. D. 1933.

BAKER & WHITNEY
Attorney for Defendants.

Plaintiff's Costs $646.46 taxed and entered this 19th day of June, 1933.

J. LEE BAKER, Clerk
By George A. Hillier
Deputy Clerk.

[Endorsed]: Filed Jun 10, 1933. [102]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF TUESDAY, JUNE 13, 1933

This being the time heretofore fixed for taxing plaintiff's costs herein, Messrs. Elliott and Snell, by Frank L. Snell, Jr., Esquire, appear for plaintiff, and Messrs. Baker and Whitney, by Alexander B. Baker, Esquire, appear for Defendants.

Upon motion of counsel for defendants, and upon the consent of counsel for plaintiff,

IT IS ORDERED that the taxing of costs herein be continued and reset for Monday, June 19, 1933, at the hour of 9:30 o'clock, A. M.

Upon motion of Alexander B. Baker, Esquire,

IT IS ORDERED that the Defendants' time be extended for a period of forty (40) days from and after this date, within which to prepare, serve and file Bill of Exceptions. [103]

[Title of Court and Cause—Consolidated Cases.]

DEFENDANTS' EXCEPTIONS TO STATEMENT OF COSTS.

NOW COME the defendants and except to Plaintiff's Statement of Costs and the following items thereof, to-wit:

1. To the item of $626.56, attorneys' fees, on the ground it is not recoverable as costs in that the amount is excessive to such an extent as to amount to an abuse by the Court of its discretion, and upon the further ground that attorneys' fees are allowable only if the plaintiff shall finally prevail, and this case has not been finally concluded, as defendants have notified Court and Counsel of their intention to appeal from the Judgment.

2. To the item of $3.90 for certified copies from the I. C. C. of Rule "V" Statements, etc., upon [104] the ground that the same is not recoverable

as costs and is merely an expense incidental to the preparation of the case for trial.

Dated: June 16, 1933.

BAKER & WHITNEY
CHALMERS, FENNEMORE & NAIRN
GERALD E. DUFFY
J. E. LYONS
BURTON MASON
Attorneys for Defendants.

Received copy within Exceptions this 17th day of June, 1933.

SAMUEL WHITE
Attorney for Plaintiff.

Overruled. June 19, 1933, 9:30 A. M.

J. LEE BAKER, Clerk
By George A. Hillier,
Deputy Clerk.

[Endorsed]: Filed Jun 17, 1933. [105]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF MONDAY, JUNE 19, 1933

Messrs. Elliott and Snell, by Frank L. Snell, Jr., Esquire, and Samuel White, Esquire, appear for Plaintiff.

Messrs. Baker and Whitney, by Alexander B. Baker, Esquire, appear for the Defendants.

Objection to the decision of the Clerk in taxing plaintiff's costs is now made to the Court by said counsel for the defendants, and particularly to the

items of attorneys' fees and certified copies of Rule V of the Interstate Commerce Commission, and

IT IS ORDERED that said objection be overruled, and that the decision of the Clerk in allowing said costs be, and the same is hereby affirmed, to which ruling and Order of the Court, the defendants except.

Upon motion of Alexander B. Baker, Esquire,

IT IS ORDERED that Stay of Execution of Judgment be extended for a period of forty (40) days from and after June 13, 1933. [106]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF MONDAY,
JULY 10, 1933

IT IS ORDERED that Defendants may have until and including the 1st day of September, 1933, within which to serve and file Bill of Exceptions, in accordance with the Stipulation on file herein. [107]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF WEDNESDAY,
AUGUST 30, 1933

Upon motion of T. G. Nairn, Esquire, of counsel for Defendants, and upon his representation that said Motion is made upon Plaintiffs' request,

IT IS ORDERED that Plaintiffs' time within which to file proposed Amendments and Exceptions to Bill of Exceptions on file herein, be, and the same is hereby extended to and including September 9, 1933. [108]

[Title of Court and Cause—Consolidated Cases.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that on or about the 12th day of October, 1932, the above-entitled cause came on regularly for trial before the Honorable F. C. Jacobs, United States District Judge in and for the District of Arizona, sitting without a jury, a jury trial having been expressly waived by written stipulation signed by counsel for plaintiff and defendants and duly filed in said cause. Plaintiff appeared by its counsel, Samuel White and F. L. Snell, Jr., Esquires, of Phoenix, Arizona, and defendants appeared by their counsel, Messrs. Baker & Whitney, and Chalmers, Fennemore & Nairn, of Phoenix, Arizona, and James E. Lyons, Gerald E. Duffy and Burton Mason, Esquires, of San Francisco, California.

Thereupon, there was offered in evidence by plaintiff, and received as Plaintiff's Exhibit 1, a copy of the opinion and order of the Interstate Commerce Commission in Docket 16742, and associated cases, Traffic Bureau, Phoenix Chamber of Commerce, et al. v. The A. T. & S. F. Ry. Co., et al., 140 I. C. C. 171. A true and correct copy of said opinion and order in said Docket 16742 is attached as Exhibit "A" to the complaint of plaintiff on file herein; and to save repetition the same is hereby referred to, with the same force and effect as if here set forth.

Thereupon, there was offered in evidence by plaintiff, and re- [109] ceived as Plaintiff's Exhibit

2, a copy of an order for the payment of reparation made by the Interstate Commerce Commission under date of April 14th, 1930, in Docket No. 14140, Solomon-Wickersham Company v. Santa Maria Valley R. Co., et al. A true and correct copy of said order so received as Exhibit 2 is annexed as Exhibit "C" to the complaint of plaintiff on file herein; and to save repetition the same is hereby referred to, with the same force and effect as if here set forth.

Thereupon, there was offered in evidence by plaintiff, and received as Plaintiff's Exhibit 3, a certified copy of certain statements showing shipments made to and received by plaintiff, upon which reparation was and is claimed by said plaintiff. A full, true and correct copy of said Exhibit 3 is annexed as Exhibit "B", to the complaint of the plaintiff on file herein; and to save repetition the same is hereby referred to, with the same force and effect as if here set forth.

Thereupon there were offered in evidence by plaintiff by reference, with the same effect as if reproduced physically in the record, and received without objection, the reports of the Interstate Commerce Commission in Docket No. 14999, Arizona Corporation Commission v. A. E. R. Co., et al., 113 I. C. C. 52, and Same v. Same (on reargument) 142 I. C. C. 61.

Thereupon plaintiff offered further evidence as follows:

TESTIMONY OF L. G. REIF.

Direct Examination.

(It was admitted, on behalf of defendants, that Mr. Reif had had several years experience as Rate Expert for the Arizona Corporation Commission, and was competent to examine tariffs and compile therefrom exhibits showing rates; that he was familiar with the tariffs covering rates and charges from interstate points to Arizona; and qualified by experience to express an opinion with regard to such rates.)

"The statement which you have shown to me is an exhibit showing the average distances in miles from the Southern California group to various groups of destinations in Arizona, together with certain scales of rates on various bases, as shown on the exhibit, from the Southern California group to the Arizona groups; also arbitraries from the Northern California group over the rates from the Southern California group, and rates from the Northern California group to the Arizona destination groups made on the basis of the arbitraries, together with certain other rates for purposes of comparison. This tabulation has been checked by me and found to be correct."

Thereupon there was offered in evidence by plaintiff, as its Exhibit 4, the statement referred to in the testimony of Witness Reif. Defendants duly objected to the receipt in evidence of said statement, upon the ground that the same was and is incompetent, and also irrelevant and immaterial to the

(Testimony of L. G. Reif.)

issues in this cause. Said objection was overruled by the Court: to which ruling defendants then and there duly excepted. Said statement was thereupon received in evidence as Plaintiff's Exhibit 4. and is, in words and figures. as follows:

Plaintiffs Exhibit no. 4.

	FROM SOUTHERN CALIFORNIA GROUP							FROM NORTHERN CALIFORNIA GROUP				
		1	2	3	4	5	6	7	8	9	10	11
TO	(a) Average Distance	Rates Charged	Memphis-South-western Sugar Rates	120 Per Cent Memphis-South-western Sugar Rates	Rates Prescribed for Reparation Period	120 Per Cent Consolidated South-western Sugar Rates	Rates Prescribed for Future	Arbitraries	Rates in Column 3 Plus Arbitraries	Rates Prescribed for Reparation Period	Rates in Column 5 Plus Arbitraries	Rates Prescribed for Future
	(Miles)		(Cents)	(Cents)	(Cents)	(Cents)	(Cents)	(Cents)	(Cents)	(Cents)	(Cents)	(Cents)
Group 1-												
Yuma	267	SEE RULE V	40	48	66	45½	46	20	68	66	65½	66
Group 3-												
Kingman	383		47	56	68	56½	57	12	68	69	68½	69
Group 4-												
Tucson												
Prescott	539		55	66	73	65	65	12	78	77	77	77
Williams												
Flagstaff												
Group 5-												
Winslow												
Bisbee												
Bowie	635		59	71	75	72	72	12	83	84	84	84
Douglas												
Holbrook												
Group 6-												
Safford	674		60	72	77	74½	75	12	84	87	86½	87
Group 7-												
Gallup												
Clifton	752		64	77	79	79	79	10	87	89	89	89
Globe												

REFERENCES

Column 1 See Rule V Statements (or reparation claims).
2 For rates see 77 I.C.C. 595.
3 Rates shown in 77 I.C.C. 595 plus 20 per cent.
4 140 I.C.C. 180
5 Rates shown in 123 I.C.C. 452, 477 plus 20 per cent.
6 140 I.C.C. 181.
7 Arbitraries added by Commission to the rates from Southern California Groups to make the through rates from Northern California Groups, 140 I.C.C. 181.
8 Memphis-Southwestern sugar rates plus 20 per cent plus arbitraries.
9 140 I.C.C. 180.
10 Consolidated Southwestern sugar rates plus 20 per cent plus arbitraries.
11 140 I.C.C. 181.
(a) See Docket 16742, 140 I.C.C. 171, at 178.

(Testimony of L. G. Reif.)

Witness Reif thereupon testified further as follows:

"I have formed an opinion as to the reasonableness of the rates on sugar to points in Arizona from points in California, particularly northern California, basing my opinion upon the decision of the Interstate Commerce Commission in Docket No. 14999, reported 113 I. C. C. 52, by applying, to the first-class rates prescribed in that case, the percentage relationship prescribed for sugar in the Consolidated Southwestern Cases, 123 I. C. C. 203."

Defendants thereupon objected to any expression of opinion by the witness upon the basis stated, upon the ground that the same was incompetent, in that the decision relied upon was itself already a part of the record and the best authority; and further, in that the opinion was irrelevant and immaterial, in that it purported to relate to rates to a group of destinations, rather than to the point of destination involved in this case, and to rates during the period subsequent to 1926, and particularly for the future, whereas the issue here involved only shipments moving prior to 1924; which objection was overruled by the Court; to which ruling defendants then and there duly excepted.

Thereupon Witness Reif testified further as follows:

"I have based my testimony on the opinion in Docket 14999, because the Commission in Docket 16742 took cognizance of the conditions found in Docket 14999. A pertinent portion of the latter decision reads as follows:

(Testimony of L. G. Reif.)

> 'The Santa Fe showed that the population per square mile along its line in Eastern California, Northern Arizona, and Western New Mexico, is generally comparable with that in Texas differential territory and much less than in the territory covered by the Memphis-Southwestern scale. The population per square mile in most of California, Southern Arizona, and parts of New Mexico, however, appears to be generally greater than in Western Texas east of El Paso. [112] The revenue ton miles and the freight revenue per mile of road were generally greater, and the operating ratios were lower, on the Southern Pacific and Santa Fe than on most of the other principal lines in the Southwest for the years 1920 and 1921. It is defendants' contention that the rate from San Francisco is affected by water competition which is disputed by Los Angeles interveners. There is active water competition between San Francisco and Los Angeles, but there does not appear to be any movement from San Francisco by water and rail to points in Arizona.'

In the Consolidated Southwestern Cases rates on sugar were made on the basis of 30 per cent of the first-class rates. 30 per cent of the first-class rates prescribed in Docket No. 14999 from California points to Arizona would produce a rate, for the average distance of 961 miles from the San Francisco group to Bowie, of 90 cents, disregarding

(Testimony of L. G. Reif.)

water competition, whereas for reparation purposes the Commission in the instant case prescribed 84 cents. Taking the rates actually published by the carriers following the decision in Docket No. 14999, which were lower than the basis prescribed, because of water competition claimed by the carriers to exist, and applying 30 per cent, the resulting rate from the San Francisco group to Bowie would be 80 cents. On the same basis, the reasonable rate from the Los Angeles group would be 65 cents."

Cross Examination:

"The rates from the Los Angeles and San Francisco groups which I have recited are based upon the mileage shown on page 178 of Plaintiff's Exhibit 1. While I derived a rate of 90 cents from northern California points to Bowie, based upon the application of the 30 per-cent factor to the Docket No. 14999 first-class scale, I think that the rate of 84 cents, fixed by the Commission for reparation purposes, might well have been lower in view of the water competition claimed by the carriers to exist; although there is no [113] showing from which I can find that water competition actually did exist. The 90-cent rate would be the measure of a maximum rate, that is to say, the maximum reasonable rate.

A decision of the Interstate Commerce Commission prescribing a reasonable rate between two points would not necessarily be used as the measure of a reasonable rate between two other related

(Testimony of L. G. Reif.)

points in the same territory, although it would be entitled to some consideration. A rate prescribed as reasonable from Los Angeles to Maricopa would be given some consideration as a fair measure of a rate on the same commodity from Los Angeles to Phoenix, all conditions being equal. While it is true that the Commission in the First Phoenix Case (1921), 62 I.C.C. 412, prescribed a rate of 96½ cents from Los Angeles to Phoenix, I justify the application of a rate of 75 cents from Los Angeles to Bowie for a distance 167 miles greater, upon the ground that the record in the First Phoenix Case was incomplete. The complaint in that case asked for reasonable rates; in other words, it invoked Sections 1, 2 and 3, but what it really sought was the removal of discrimination between the main line points and Phoenix under Section 3; and all that was done was to eliminate the branch-line arbitrary to Phoenix. The record in the case was not complete. In Docket 14999, in which the record was a whole lot more complete than that made in the Sugar Case, a higher rate was prescribed to Bowie than to Phoenix, the Commission taking into consideration the 167 miles longer haul.

My Exhibit 4 is largely a copy of a tabulation shown on page 178 of Plaintiff's Exhibit 1, with some additions, and except that the proposal made by the complainants in that case is omitted, and group mileages have been substituted in place of mileages to individual points. On the basis of the short-line mileage of 1021 miles, from San Fran-

(Testimony of L. G. Reif.)

cisco to Bowie, the first-class rate under the Docket 14999 scale would be $3.13. On the basis of a short-line mileage of 787 miles from San Francisco to Phoenix, the first-class [114] rate under the Docket 14999 scale is $2.55. These are the rates as prescribed by the Commission in that case."

Re-direct Examination:

Witness Reif was asked by plaintiff's counsel whether he had in mind the comment made by the Commission in its decision in Docket No. 16742 (140 I.C.C. 171), in saying that the record in the First Phoenix Case in 1921 was not complete and that a lower rate might have been justified upon a more comprehensive record; to which question defendants then and there objected, upon the ground that the same was irrelevant and immaterial, in that the matter had been considered by the United States Supreme Court and a contrary ruling already made; upon the further ground that the witness was incompetent, and not properly qualified, in that he had shown no familiarity with the 1921 case; and upon the further ground that the witness was further incompetent, in that the opinion of the Commission in Docket No. 16742 speaks for itself; each and all of which objections were overruled by the Court; to which ruling defendants then and there duly excepted.

Thereupon Witness Reif testified as follows:

"A lower rate to Phoenix might have been justified upon a more comprehensive record in the First

(Testimony of L. G. Reif.)

Phoenix Case. In the opinion in Docket No. 16742, at page 180, the Commission said that the prior record was incomplete, and that this was the first comprehensive record they had had. The First Case was incomplete, because all that was asked for was a removal of discrimination under Section 3.

Re-cross Examination:

"I became familiar with the First Phoenix Case by reading the decision and seeing the exhibits. The defendants must have introduced evidence in that case, but I am not familiar with it. My only knowledge of the state of that record was acquired from the statement made by the Commission in Docket No. 16742, and from seeing the exhibits in the First Phoenix Case." [115]

Thereupon plaintiff rested.

Thereupon defendants moved the Court for a nonsuit, and for an order dismissing the complaint, and for the entry of judgment against the plaintiff and in favor of the defendants, upon the ground that plaintiff's evidence showed affirmatively that it had no right to recover, and that its entire case was predicated upon an order for reparation which the Interstate Commerce Commission was without jurisdiction to make; and upon the further ground that plaintiff's affirmative showing demonstrated that the rates charged upon the shipments as to which reparation was claimed were not unjust, unreasonable, or otherwise unlawful; which motion of the defendants was denied and overruled by the Court;

to which ruling of the Court defendants then and there duly excepted.

Thereupon there was offered in evidence by the defendants, and received as Exhibit "A", a true and correct copy of the report and order of the Interstate Commerce Commisison in Docket 6806, Arizona Corporation Commission v. A. T. & S. F. Ry. Co., et al., 34 I.C.C. 158, in words and figures as follows: [116]

EXHIBIT "A"

3024

INTERSTATE COMMERCE COMMISSION.

No. 6806.

ARIZONA CORPORATION COMMISSION

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, ET AL. [117]

No. 6806.

ARIZONA CORPORATION COMMISSION

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, ET AL.

Submitted November 30, 1914.

Decided May 25, 1915.

The complaint attacks as unreasonable the rates on sugar and sirup in straight and mixed carloads from producing and refining points in California to all points in Arizona. Subsequent to

the hearing the carriers published reduced rates on these commodities to many points of destination in the state; Held:

1. Except as to the rates to Phoenix and Prescott, Ariz., the evidence of record does not show that the rates in effect at the time of the hearing on sugar and sirup in straight carloads, minimum weight 36,000 pounds, were unreasonable to a greater extent than the amounts of the reductions since made.
2. Rates to Phoenix and Prescott ordered to be established for the future upon a basis of not more than 5 cents per 100 pounds higher than the rates to the junction points.
3. No finding is made as to the rates on sugar and sirup in mixed carloads.

F. A. Jones for Arizona Corporation Commission.

F. H. Wood for Southern Pacific Company and Arizona Eastern Railroad Company.

T. J. Norton and E. W. Camp for Atchison, Topeka & Santa Fe Railway Company.

Hawkins & Franklin for El Paso & Southwestern Company.

REPORT OF THE COMMISSION.

DANIELS, Commissioner:

The Arizona Corporation Commission brings the proceeding against all carriers which are engaged in the transportation of sugar and sirup from points of origin in the state of California to points of destination in the state of Arizona. It is alleged that the rates on sugar and sirup, in straight and mixed

carloads, from all refining and shipping points in the state of California to all points in the state of Arizona are unjust and unreasonable. It is not alleged, however, that the rates under attack cause any discrimination.

Substantial reductions have been made in the rates on sugar and sirup from California to Arizona points as a result of two recent decisions of the Commission, one of which has been announced since [118] this proceeding was commenced. In Maier & Co. v. S. P. Co., 29 I. C. C., 103, a rate of 90 cents per 100 pounds for the transportation of sugar in carloads, minimum weight 36,000 pounds, from Los Angeles and Los Alamitos, Cal., to Benson, Ariz., was found to be unreasonable and in violation of the fourth section of the act. It was held that the rate to this point was unreasonable in so far as it was in excess of 60 cents.

In conformity with this decision the rate from Los Angeles to Benson was made 60 cents, effective March 15, 1914, and by the same tariff reductions were made to 60 cents in all rates which had exceeded 60 cents from the same point to main-line stations of the Southern Pacific in Arizona. Substantial reductions were also made in the rates on sugar from San Francisco. Prior to March 15, 1914, rates from this point were graded from 85 cents at Yuma, Ariz., to 100 cents at Bowie, Ariz., minimum weight 36,000 pounds. Effective on that date the rates from San Francisco to all points in Arizona on the main line of the Southern Pacific were fixed at 70 cents with the same minimum, and

they have now been reduced to 60 cents, thereby putting them upon the same basis as those from Los Angeles. San Francisco has also been accorded the Los Angeles rates to other Arizona points.

This complaint was filed on April 15, 1914. At that time certain applications for relief from the provisions of the fourth section which concerned some of the rates here involved were pending before the Commission. These applications were decided after the hearing of the issues in this case and are reported in Fourth Section Violations in Rates on Sugar, 31 I. C. C., 511. Reference is made to the report in that case for a full statement of the facts and issues there involved. It is sufficient here to state that our order in that case denied authority to continue lower rates on sugar from San Francisco and other sugar-producing points in California to Trinidad, Colo., and other points east thereof, than the rates concurrently applicable on like traffic to intermediate points on the line of the Santa Fe. The order also denied authority to the Southern Pacific, El Paso & Southwestern, and the Chicago, Rock Island & Pacific to continue lower rates on sugar from San Francisco and other sugar-producing points in California to the Missouri River than the rates concurrently applicable to intermediate points west of Tucumcari, N. Mex. Pursuant to the orders made in Fourth Section Violations in Rates on Sugar, supra, the carriers filed new schedules of rates effective in November and December, 1914, which work substantial reductions

in the rates which were in effect when this complaint was filed.

A further change in rates should be noted. Effective November 15, 1914, rates on sugar were established to practically all Arizona [119] points conditioned upon a minimum weight of 60,000 pounds, which rates were the same from all California producing points, and almost uniformly on a basis of 5 cents lower than the rates from Los Angeles to the same destinations upon the 36,000-pound minimum. A desire for these lower rates with the higher minimum was expressed by complainant's witnesses.

The following table, in which certain points are taken as representative of all points of destination in Arizona, shows the recent reductions in rates on sugar to which we have referred in the foregoing paragraphs. Rates are stated per 100 pounds:

To—	From Los Angeles, Cal., effective—			From San Francisco, Cal., effective—		
	Prior to Mar. 15, 1914.[1]	Mar. 15, 1914, or subsequently.[1]	Nov. 15, 1914, or subsequently.[2]	Prior to Mar. 15, 1914.[1]	Mar. 15, 1914, or subsequently.[1]	Nov. 15, 1914, or subsequently.[2]
Main-line Santa Fe stations:						
Kingman, Ariz.	$0.72	$0.60	$0.55	$0.82	$0.60	$0.55
Ashfork, Ariz.	.83	.60	.55	.93	.60	.55
Flagstaff, Ariz.	.92	.60	.55	1.00	.60	.55
Holbrook, Ariz.	1.00	.60	.55	1.00	.60	.55
Via Santa Fe, Prescott & Phoenix: Prescott, Ariz.	.83	.75	.70	.93	.75	.70
Main-line Southern Pacific stations:						
Yuma, Ariz.	.66	.60	.53	.85	.60	.55
Kim, Ariz.	.83	.60	.55	.93	.60	.55
Maricopa, Ariz.	.83	.60	.55	.93	.60	.55
Tucson, Ariz.	.83	.60	.55	.93	.60	.55
Benson, Ariz.	.90	.60	.55	1.00	.60	.55
Cochise, Ariz.	.90	.60	.55	1.00	.60	.55
Bowie, Ariz.	.90	.60	.55	1.00	.60	.55
Via branch line Southern Pacific: Nogales, Ariz.	.90	.82	.77	1.00	.82	.77
Via Arizona Eastern:						
Phoenix, Ariz.	.83	.75	.70	.93	.75	.70
Globe, Ariz.	1.30	1.00	.....	1.40	1.00	.....
Kelton, Ariz.	1.05	.75	.70	1.15	.75	.70
Via El Paso & Southwestern:						
Bisbee, Ariz.	.90	.60	.55	1.00	.60	.55
Douglas, Ariz.	.90	.60	.55	1.00	.60	.55
Via Arizona & New Mexico:						
Clifton, Ariz.	1.21	.91	.86	1.31	.91	.86

Substantial reductions in the rates on sirup have also been recently made. Taking the stations named in the foregoing table the rates on sirup from Los Angeles in effect prior to March 15, 1914, compared with the present rates show the following reductions in cents per 100 pounds: To Yuma, from 66 to 53; to Kim, from 83 to 63; to Maricopa and Tucson, from 83 to 75; to Benson, Cochise, and Bowie, from 90 to 75; to Globe, from 130 to 115; to Kelton, from 105 to 90; to Bisbee and Douglas, from 90 to 75; to Clifton, from 121 to 106. The rates to Kingman, 72 cents, to Ashfork, Flagstaff, Holbrook, Phoenix, and Prescott, 75 cents, remain unchanged. It appears that the rate to Florence has been increased from 75 to 80 cents, and that the rate to Nogales has been increased from 90 to 97 cents. Relatively similar reductions have been made in the rates on sirup from [120] San Francisco. The minimum weight prescribed for the rates on sirup is 36,000 pounds. Rates have not been established for the minimum weight of 60,000 pounds, as in the case of sugar.

Prior to March 15, 1914, the rates on mixed carloads of sugar and sirup, minimum weight 36,000 pounds, from Los Angeles and San Francisco to Arizona points were substantially the same as the rates then in effect on sugar. In December, 1914, the commodity rates applicable to mixed carloads were canceled, leaving fifth-class rates applicable to all points in Arizona. To certain of these points the fifth-class rates were reduced, effective November

To—	From Los Angeles, Cal., effective—			From San Francisco, Cal., effective—		
	Prior to Mar. 15, 1914.1	Mar. 15, 1914, or subsequently.1	Nov. 15, 1914, or subsequently.2	Prior to Mar. 15, 1914.1	Mar. 15, 1914, or subsequently.1	Nov. 15, 1914, or subsequently.2
Main-line Santa Fe stations:						
Kingman, Ariz.	$0.72	$0.60	$0.55	$0.82	$0.60	$0.55
Ashfork, Ariz.	.83	.60	.55	.93	.60	.55
Flagstaff, Ariz.	.92	.60	.55	1.00	.60	.55
Holbrook, Ariz.	1.00	.60	.55	1.00	.60	.55
Via Santa Fe, Prescott & Phoenix: Prescott, Ariz.	.83	.75	.70	.93	.75	.70
Main-line Southern Pacific stations:						
Yuma, Ariz.	.66	.60	.53	.85	.60	.55
Kim, Ariz.	.83	.60	.55	.93	.60	.55
Maricopa, Ariz.	.83	.60	.55	.93	.60	.55
Tucson, Ariz.	.83	.60	.55	.93	.60	.55
Benson, Ariz.	.90	.60	.55	1.00	.60	.55
Cochise, Ariz.	.90	.60	.55	1.00	.60	.55
Bowie, Ariz.	.90	.60	.55	1.00	.60	.55
Via branch line Southern Pacific: Nogales, Ariz.	.90	.82	.77	1.00	.82	.77
Via Arizona Eastern:						
Phoenix, Ariz.	.83	.75	.70	.93	.75	.70
Globe, Ariz.	1.30	1.00	.....	1.40	1.00	.....
Kelton, Ariz.	1.05	.75	.70	1.15	.75	.70
Via El Paso & Southwestern:						
Bisbee, Ariz.	.90	.60	.55	1.00	.60	.55
Douglas, Ariz.	.90	.60	.55	1.00	.60	.55
Via Arizona & New Mexico:						
Clifton, Ariz.	1.21	.91	.86	1.31	.91	.86

1. Minimum weight, 36,000 pounds. 2. Minimum weight, 60,000 pounds.

Substantial reductions in the rates on sirup have also been recently made. Taking the stations named in the foregoing table the rates on sirup from Los Angeles in effect prior to March 15, 1914, compared with the present rates show the following reductions in cents per 100 pounds: To Yuma, from 66 to 53; to Kim, from 83 to 63; to Maricopa and Tucson, from 83 to 75; to Benson, Cochise, and Bowie, from 90 to 75; to Globe, from 130 to 115; to Kelton, from 105 to 90; to Bisbee and Douglas, from 90 to 75; to Clifton, from 121 to 106. The rates to Kingman, 72 cents, to Ashfork, Flagstaff, Holbrook, Phoenix, and Prescott, 75 cents, remain unchanged. It appears that the rate to Florence has been increased from 75 to 80 cents, and that the rate to Nogales has been increased from 90 to 97 cents. Relatively similar reductions have been made in the rates on sirup from [120] San Francisco. The minimum weight prescribed for the rates on sirup is 36,000 pounds. Rates have not been established for the minimum weight of 60,000 pounds, as in the case of sugar.

Prior to March 15, 1914, the rates on mixed carloads of sugar and sirup, minimum weight 36,000 pounds, from Los Angeles and San Francisco to Arizona points were substantially the same as the rates then in effect on sugar. In December, 1914, the commodity rates applicable to mixed carloads were canceled, leaving fifth-class rates applicable to all points in Arizona. To certain of these points the fifth-class rates were reduced, effective November

27, 1914. From Los Angeles to Yuma this reduction is from 66 to 53 cents; to Kim, from 83 to 63 cents; from San Francisco to Yuma the reduction is from 85 to 75 cents; to Kim, from 93 to 81 cents. The effect of these class-rate reductions is to make lower rates on the mixture of sugar and sirup to these two points than were formerly in effect. To certain other points the commodity rates formerly applicable were the same as the fifth-class rates. In the main, however, the cancellation of commodity rates applicable to mixed carloads of sugar and sirup has resulted in increased rates on this mixture.

An analysis of the changes made in the rates on sugar and sirup, as outlined in the foregoing paragraphs, shows that the rates now in effect to many Arizona points are substantially lower than when this proceeding was brought. It appears, also, however, that the rates to the main-line points which were formerly graded are now largely blanketed to all of these points. It is further to be noted that the destinations on branch lines have not been accorded the full reductions made to main-line points. The rate formerly in effect on sugar from Los Angeles both to Maricopa and Phoenix, with the minimum weight of 36,000 pounds, was 83 cents. The rates as reduced are now 60 and 75 cents, respectively, a differential of 15 cents to the branch-line point over the rate to the junction point on the main line.

Complainant's evidence, other than that relating to commercial conditions, consisted in the main of

exhibits comparing the rates to Arizona points which were in effect when this proceeding was brought with rates on sugar applicable to other movements. In view of the changes in the Arizona rates as above set forth, these exhibits are less persuasive upon the present adjustment of rates than upon the rates as established prior to those changes. Upon examination of all the evidence of record, we are of the opinion and find that the rates on sugar and sirup in straight carloads from points in California to points in Arizona in effect at the time of the hearing have not been shown to be unreasonable to a greater extent than the amounts of the reductions since made. In view of the fact, however, that the carriers have to a considerable extent disregarded distance as a [121] factor in the making of the California-Arizona sugar rates, having established extensive blankets both as to origin and destination points, it is the opinion of the Commission that the present rates to Phoenix via the Southern Pacific and the Arizona Eastern and to Prescott via the Santa Fe are unreasonable in so far as they exceed the rates to the junction points by more than 5 cents per 100 pounds, and that rates for the future should be established upon a basis of not more than 5 cents per 100 pounds over the junction point rates.

The facts of record being insufficient to warrant any finding as to the rates on mixed carloads of sugar and sirup, none will be made.

An order will be entered in accordance with the conclusions herein stated. [122]

ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 25th day of May, A, D. 1915.

No. 6806.

ARIZONA CORPORATION COMMISSION

v.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY; ARIZONA EASTERN RAILROAD COMPANY; ARIZONA & NEW MEXICO RAILWAY COMPANY; SOUTHERN PACIFIC COMPANY; EL PASO & SOUTHWESTERN COMPANY; AND SANTA MARIA VALLEY RAILROAD.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before August 15, 1915, and thereafter to abstain, from charging, demanding, collecting, or receiving their present rates for the transportation of sugar in carloads, minimum weight 36,000 pounds, from points in California to Prescott and Phoenix, Ariz., which said rates have been

found in said report to be unreasonable.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified, and required to establish, on or before August 15, 1915, upon notice to the Interstate Commerce Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed by section 6 of the act to regulate commerce, and thereafter to maintain and apply to the transportation of sugar in carloads, minimum weight 36,000 pounds, from points in California to Prescott, Ariz., [123] via Ashfork, Ariz., rates which shall not exceed those contemporaneously in effect from the same points of origin to Ashfork by more than 5 cents per 100 pounds, and to Phoenix, Ariz., via Maricopa, Ariz., rates which shall not exceed those contemporaneously in effect to Maricopa by more than 5 cents per 100 pounds.

And it is further ordered, That this order shall continue in force for a period of not less than two years from the date when it shall take effect.

By the Commission.

[Seal] GEORGE B. McGINTY,
Secretary. [124]

Thereupon there was offered in evidence by defendants, and received as Exhibit "B", a true and correct copy of the report and order of said Commission in Docket 11532, Traffic Bureau, Phoenix Chamber of Commerce v. Director General, et al., 62 I. C. C. 412. A true and correct copy of said Exhibit "B" is as follows: [132]

EXHIBIT "B"

No. 11532

TRAFFIC BUREAU, CHAMBER OF COMMERCE, PHOENIX, ARIZ., ET AL.

v.

DIRECTOR GENERAL, AS AGENT, SOUTHERN PACIFIC COMPANY, ET AL.

Submitted April 12, 1921. Decided June 22, 1921.

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1. Rates on sugar, in carloads, from California points to Phoenix, Ariz., found unreasonable. Reasonable rate prescribed for the future.
2. Following Phoenix Chamber of Commerce v. Director General, 62 I. C. C. 368, prayer for the establishment of through routes and joint rates from San Francisco, Calif., by way of Phoenix, to points on the Southern Pacific, Maricopa, Ariz., to El Paso, Tex., denied.

Roland Johnston, for complainants.

F. A. Jones for Arizona Corporation Commission, intervener.

E. W. Camp, Elmer Westlake, G. H. Baker, and M. A. Cummings for defendants.

REPORT OF THE COMMISSION.

Division 1, Commissioners McChord, Aitchison, and Lewis.

AITCHISON, Commissioner:

This case was made the subject of a proposed report by the examiner. Exceptions thereto were filed by defendants.

Complainants are the Traffic Bureau, Chamber of Commerce, Phoenix, Ariz., an organization of shippers and citizens of Phoenix, Hall-Pollock Company, and Haas-Baruch & Company, corporations, and the Arizona Grocery Company, a partnership.

The three firms named are engaged in the grocery business at Phoenix. By complaint filed June 14, 1920, they allege that the rates charged by defendants for the transportation of sugar from points in California to Phoenix, were and are unjust, unreasonable, unjustly discriminatory, and unduly prejudicial in violation of sections 1, 2, 3, and 4 of the interstate commerce act and section 10 of the federal control act. They ask us to prescribe just and reasonable rates for the future, to award reparation on all shipments moving subsequently to May 2, 1916, and to establish through routes and joint rates from San Francisco, Calif., by way of Phoenix, to Maricopa, Ariz., and points east thereof, on lines of the Southern Pacific Company, to and including El Paso, Tex. The Arizona Cor- [126] poration Commission intervened on behalf of complainants. The allegation of a fourth section violation was abandoned at the hearing. Rates are stated herein in amounts per 100 pounds.

Phoenix is the only point in Arizona common to the lines of the Atchison, Topeka & Santa Fe Railway and the Southern Pacific. It is located on the branch of the Santa Fe extending south from Ash Fork, Ariz., but is served by that carrier on traffic from California by means of a branch line known as the Parker cut-off, which leaves the main line

at Cadiz, Calif., and connects with the Ash Fork branch at Wickenburg, Ariz. Phoenix is served by the Southern Pacific through the medium of the Arizona Eastern Railroad, which it owns and with which it connects at Maricopa, a point on the main line 35 miles southerly from Phoenix. The short-line mileage from San Francisco to Phoenix is via the Santa Fe over the Parker cut-off; from Los Angeles, via the Southern Pacific lines.

Sugar is produced at various points in California. Hawaiian cane sugar is refined at San Francisco and at Crockett, a point 29 miles east of San Francisco on the Southern Pacific; beet sugar is produced at Alvarado, Betteravia, Spreckels, Los Alamitos, Dyer, Delhi, Oxnard, and other points in the central and southern portions of the state. For the purpose of stating rates to Arizona, the refining and producing points of origin in California are included in one group. Rates on sugar from California are also grouped as to destination points. On the main line of the Santa Fe a destination group extends from Yucca, Ariz., to El Paso, and on the main line of the Southern Pacific from Yuma, Ariz., to El Paso. Los Angeles is the nearest point in the California group to Phoenix, and San Francisco possibly the farthest. The distances to Phoenix via the Santa Fe are 489 and 800 miles, and via the Southern Pacific, 451 and 920 miles, respectively, from the two points of origin.

On May 1, 1916, the rates on sugar from the California group to Phoenix were 60 cents, minimum weight 60,000 pounds, and 65 cents, minimum weight

36,000 pounds. Contemporaneously rates from the California group to points in the destination groups described were 5 cents lower than the corresponding Phoenix rates. This difference of 5 cents in favor of main-line points was fixed by us in Arizona Corporation Commission v. A., T. & S. F. Ry. Co., 34 I. C. C., 158, in which we found the Phoenix rate of 75 cents, minimum 36,000 pounds, unreasonable to the extent that it exceeded, by more than 5 cents, the main-line rate to Maricopa. On June 25, 1918, these rates were increased 25 per cent, the main-line rates becoming 69 and 75 cents and the Phoenix rates 75 and 81.5 cents. Subsequently a flat increase of 22 cents was substituted for the percentage increases, and the rates to main-line points became 77 and 82 cents on November [127] 25, 1919, and to Phoenix, 82 and 87 cents on February 18, 1920. On February 29, 1920, defendants canceled the rates to main-line and branch-line points, including Phoenix, under the lower minimum weight published in connection with roads under federal control and, as to such roads, increased the Phoenix rate under the minimum weight of 60,000 pounds to 83.5 cents which, apparently, was done by advancing the 5-cent difference over main-line points to 6.5 cents. In schedules filed to become effective May 14, 1920, the carriers attempted to bring the rates of non-federal lines into harmony with those of the lines previously under federal control, but upon protest we suspended the items carrying such increases. In Sugar from California Points to Arizona, 58 I. C. C. 737, we held that the cancellation of the 36,000 pound

minimum was justified and vacated the order of suspension. The present rates, including the general increases authorized by us on July 29, 1920, are 96.5 cents to main-line points and $1.045 to Phoenix, minimum weight 60,000 pounds. The Phoenix rate applies to practically all points on the Arizona Eastern north of Maricopa and to all points on the branch line of the Santa Fe south of Ash Fork and as far west as Parker, Ariz. There is no movement of sugar from California through Phoenix to points beyond taking lower rates.

Complainants admit that the grouping of California sugar-producing points is advantageous, as it gives them the benefit of a wide purchasing market on a uniform rate. They contend, however, that the rates to Phoenix are unreasonable, in comparison with lower rates from the California group to points involving hauls for distances which are greatly in excess of those to Phoenix. In the subjoined statement the revenues per car, per ton-mile, and per car-mile yielded by the rates to Phoenix are compared with revenues produced by certain of the rates cited by complainants. The rates shown include the general increases authorized by us on July 29, 1920.

From—	To—	Distance.	Rate per 100 pounds.	Revenue.		
				Per car.	Per ton-mile.	Per car-mile.
		Miles.			Mills.	Cents.
Los Angeles, Calif.	Phoenix, Ariz.	451	[1]$1.045	$627.00	46.3	139
San Francisco, Calif.	do	800	[1]1.045	627.00	26.1	78.3
Betteravia, Calif.	do	655	[1]1.045	627.00	31.9	95.7
Do	El Paso, Tex.	1,020	[1].965	579.00	18.9	56.7
New Orleans, La.	do	1,192	[2]1.080	388.80	18.1	32.6
San Francisco, Calif.	St. Paul, Minn.	2,154	[1]1.025	615.00	10	28.6
Los Angeles, Calif.	Chicago, Ill.	2,231	1.09525	657.00	9.8	29.4

1. Minimum weight 60,000 pounds.

2. Minimum weight 36,000 pounds.

Defendants take the position that the rates on sugar from California producing points to the central and eastern sections of the [128] country are on a subnormal basis due to the necessity of marketing the California product, which greatly exceeds local consumption, in competition with sugar refined at New Orleans and Atlantic seaboard points; that a normal basis of rates would prevent the movement of California sugar because of the great disparity in distances from the competing refineries to the common markets; and that intermediate main-line points are given the benefit of these extremely low competitive rates. They attempt to justify the present rates to Phoenix on the grounds that the volume of movement is small and that market conditions present at El Paso and the other points cited by complainant are not met with at Phoenix. They argue that we recognized the potency of market competition in Fourth Section Violations in Rates on Sugar, 31 I. C. C., 511, by permitting the maintenance of lower rates on sugar from California to Missouri River points than those contemporaneously in effect to intermediate points on the Rock Island east of Tucumcari, N. Mex., in connection with routing, Southern Pacific to El Paso, El Paso & Southwestern to Tucumcari, Rock Island beyond. In that case we required the Southern Pacific to hold the El Paso rate from California as maximum at intermediate points, and denied the Santa Fe authority to charge lower rates from California to Trinidad, Colo., and points east thereof than it contemporaneously maintained to inter-

mediate points. Accordingly, these carriers reduced the main-line rates in Arizona and New Mexico to the level of the rates to El Paso and Trinidad, respectively.

A partial list of the shipments on which reparation is sought shows that 48 carloads moved during the period June, 1919, to August, 1920, inclusive, 34 being routed via Southern Pacific and 14 via Santa Fe. A statement filed by the defendants shows that during the year 1916, 1917, 1919, and the first six months of 1920, 348 cars aggregating 9,423 tons moved from California points to Arizona via Santa Fe, of which 78 cars aggregating 2,229 tons moved to Phoenix.

From Betteravia, which may be taken as fairly representative of the California group, the present rate to Phoenix yields, for a distance of 655 miles, revenues of $627 per car, 95.7 cents per car-mile, and 31.9 mills per ton-mile upon the basis of the tariff minimum weight of 60,000 pounds. A substantial volume of sugar moves from California to Phoenix in carloads. While, no doubt, relatively lower rates are justified to more distant points where the force of market competition is controlling, nevertheless, Phoenix is entitled to rates, which, measured by present-day standards, are just and reasonable. If, however, the rates to competitive points are remunerative, then clearly the rates to Phoenix are excessive, even after giving due con- [129] sideration to the volume of traffic handled to the points in question, and the character of the haul into Arizona. The rate of 96.5 cents

from California is carried on the main line of the Southern Pacific for a distance of 400 miles east of Maricopa. The application of the same rate to Phoenix, but 35 miles distant from Maricopa does not appear to be unreasonable. The Southern Pacific and the Arizona Eastern are properly treated as one line in this instance. Pacific Creamery Co. v. S. P. Co., 42 I. C. C., 93, 96.

Complainants contend that the maintenance of rates from California of $1.045 to Phoenix and 96.5 cents to Tucson is unduly prejudicial to Phoenix, to the undue preference and advantage of Tucson. The record shows that Phoenix jobbers sell sugar at several points in territory contiguous to both Phoenix and Tucson, in competition with jobbers located at the latter point. While there is an indication that in some instances the Phoenix jobbers must shrink their profits to compete with Tucson, there is no evidence to show that this results from the difference in rates from California to the two competing points.

Complainants' request for the establishment of through routes and joint rates from San Francisco by way of Phoenix to Maricopa and points east thereof on the lines of the Southern Pacific to and including El Paso is substantially the same as was made in Phoenix Chamber of Commerce v. Director General, 62 I. C. C., 368, and the evidence is identical by reason of the stipulation into this record of the testimony there introduced. In that case we found that the proposed arrangement had not been shown to be necessary or in the public in-

terest and denied the petition. There is no basis for a different finding on this record.

We find that the rates attacked were, are, and for the future will be, unreasonable to the extent that they exceeded, exceed, or may exceed 96.5 cents. There is no evidence of record that complainants made shipments of sugar from California points to Phoenix, and paid and bore charges thereon at rates higher than those herein found reasonable. In the event that such shipments were made, complainants should file statements under rule V of the Rules of Practice, showing the details of such shipments, accompanied by appropriate proof in the form of an affidavit that the shipments were made and that the freight charges were paid and borne by complainants. If defendants object to proof in the form of an affidavit they may request a further hearing with respect to the subject matter thereof.

The prayer for a through route and joint rates from San Francisco by way of Phoenix to Maricopa and points east thereof on the line of the Southern Pacific, to and including El Paso, is denied.

An appropriate order will be entered. [130]

ORDER.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 22d day of June, A. D. 1921.

No. 11532.

Traffic Bureau of the Chamber of Commerce, Phoenex, Ariz.; Hall-Pollock Company, Phoenix, Ariz.; Haas-Baruch & Company, Incorporated, Phoenix, Ariz.; The Melczer Company, Phoenix, Ariz.; and The Arizona Grocery Company, Phoenix, Ariz.

v.

James C. Davis, Director General of Railroads, as Agent; Southern Pacific Company; Arizona Eastern Railroad Company; and The Atchison, Topeka and Santa Fe Railway Company.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and said Division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendants, according as they participate in the transportation be, and they are hereby, notified and required to cease and desist, on or before September 17, 1921, and thereafter to abstain, from publishing, de-

manding, or collecting their present rates for the transportation of sugar in carloads from California points to Phoenix, Ariz.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before September 17, 1921, upon notice to this Commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of sugar in carloads from California points to Phoenix, Ariz., rates which shall not exceed 96.5 cents per 100 pounds.

It is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission, Division 1.

[Seal] GEORGE B. McGINTY,
Secretary. [131]

Thereupon there was offered in evidence by defendants and received as Exhibit "C", a true and correct copy of the report and order of said Commission in Docket 11442, Traffic Bureau, Douglas Chamber of Commerce v. A. T. & S. F. Ry. Co., et al., 64 I. C. C. 405, in words and figures as follows: [147]

EXHIBIT "C"

7236

Interstate Commerce Commission

No. 11442

TRAFFIC BUREAU OF DOUGLAS CHAMBER OF COMMERCE AND MINES

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

Submitted July 11, 1921. Decided November 3, 1921.

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1. Class and commodity rates from points on lines of defendants in California to Douglas, Ariz., found not unreasonable or unjustly discriminatory.
2. Class and commodity rates from points in California on lines of defendants to Douglas, found unduly prejudicial to the extent that they exceed corresponding rates contemporaneously in effect from the same points of origin to Bisbee, Ariz., and to certain cross-country points on the Southern Pacific in Arizona and New Mexico.
3. Commodity rates from points on lines of defendants in Oregon and Washington, and points basing thereon, to Douglas, applicable via California junctions, found unduly prejudicial, to the extent that they exceed corresponding rates contemporaneously in effect via California junctions from the same points of origin to El Paso, Tex., and Bisbee.

E. R. Raumaker for complainant.

F. C. Tockle for El Paso Chamber of Commerce; Roland Johnston for Traffic Bureau, Chamber of Commerce, Phoenix, Ariz.; and B. D. Woodward for Murray & Layne Company, interveners.

J. L. Stewart, Boyle & Pickett, E. W. Camp, G. H. Baker, Fred H. Wood, Elmer Westlake, and C. W. Durbrow, for defendants.

REPORT OF THE COMMISSION.

Division 4, Commissioners Meyer, Daniels, Eastman, and Potter.

EASTMAN, Commissioner:

No exceptions were filed to the report proposed by the examiner. We have reached conclusions differing but slightly from those which he recommended.

Complainant is an organization of shippers and receivers of freight located at and in the vicinity of Douglas, Ariz. It alleges that the class rates, and commodity rates, except on fresh fruits and vegetables, from points on the lines of defendants in California, [133] Oregon, Washington, Idaho, Montana, Utah, Nevada, and British Columbia to Douglas are unjust, unreasonable, unjustly discriminatory, and unduly prejudicial. The Murray & Layne Company and the Traffic Bureau, Chamber of Commerce, Phoenix, Ariz., intervened on behalf of complainant. Petitions of intervention on behalf of defendants were filed by the El Paso Chamber of Commerce and by the El Paso Sash & Door Company. The latter, however, did not participate in

the hearing. We are asked to prescribe reasonable and nonprejudicial rates for the future. Rates herein are stated in amounts per 100 pounds, and do not include the general increases of 1920.

Complainant's contentions are that the importance of Douglas, as the jobbing and mining center of southern Arizona and New Mexico and the gateway to ore regions in Mexico, together with its location west of El Paso, Tex., entitle it to lower rates than El Paso from points in California; that, being on the main line of the El Paso & Southwestern, its rates should not exceed those maintained to Bisbee, Ariz., a branch-line point near by; that from San Francisco, Los Angeles, and points grouped therewith its rates are unduly high in comparison with the rates to Tucson, Willcox, and Bowie, Ariz., and to Deming, N. Mex.; that from points in Oregon, Washington, Idaho, Montana, and British Columbia, hereinafter referred to as the northwest, its rates should not exceed those in effect to El Paso; that joint rates should be established from all points in California on the Atchison, Topeka & Santa Fe, hereinafter called Santa Fe, to Douglas via Colton, Calif., or Phoenix, Ariz.; and that there are no circumstances or conditions which justify the publication of joint rates to El Paso and not to Douglas.

While the class and commodity rates from points in the northwest were put in issue, complainant stated at the hearing that if commodity rates were established from that territory to Douglas on the El Paso basis, but not to exceed the rates contemporaneously maintained to Bisbee, this phase of the complaint would be satisfied. Accordingly the class rates from the northwest will not be considered.

Douglas is situated in the extreme southeastern part of Arizona near the Mexican border on the main line of the El Paso & Southwestern, 217 miles west of El Paso and 124 miles southeast of Tucson, the western junction of that carrier with the Southern Pacific. It is 22 miles east of Osborn, Ariz., from which point a branch line of the El Paso & Southwestern extends north 7 miles to Bisbee. The Southern Pacific is the short line from Tucson to El Paso. The line [134] of the El Paso & Southwestern is somewhat longer, as it dips down to the Mexican border. Douglas is in competition with Tucson and Bisbee, and with Willcox, Bowie, and other cross-country points on the Southern Pacific, 60 to 80 miles distant by air line, for the trade of the intervening territory.

In 1888 the Arizona & South Eastern was constructed from Bisbee to Fairbank, Ariz., and about 1894 it was extended to Benson, Ariz., where connection was made with the Southern Pacific. Some years later the Southwestern Railroad of Arizona was built from Don Luis, Ariz., to Douglas, thus providing a through route from Benson to Douglas. In 1901 these lines were consolidated under the name of the El Paso & Southwestern, which in 1902 was extended into El Paso. In the same year the right of way was changed in such a way as to make Bisbee a branch-line point.

In 1901 rates between Douglas and California points were made by double combination on Benson and Don Luis. In 1903 joint class and commodity rates were established between points in California and stations on the El Paso & Southwestern, based

on the combination of locals on Fairbank. The class rates were uniformly 15 cents higher to Douglas than to Bisbee. This basis continued until 1913 when the El Paso & Southwestern was extended into Tucson, thus providing a new route for the interchange of traffic with the Southern Pacific, at which time, with a few exceptions, rates applicable from California points to El Paso via the Southern Pacific were met by the El Paso & Southwestern, and held as maxima at Douglas and all other intermediate points, Tucson to El Paso.

While rates from the east are considerably higher to Douglas than to El Paso, rates from California are either the same to both points or slightly lower to Douglas, and certain rates from the northwest are considerably higher to Douglas than to El Paso. Complainant contends that Douglas is entitled to the same advantage on traffic from the west that El Paso has on traffic from the east, particularly in the case of the shorter hauls. While the Murray & Layne Company strongly supports this contention, the El Paso Chamber of Commerce urges that no changes of this character are warranted, since Douglas and El Paso have had practically the same rates from the west for several years, and business has become adjusted to these conditions.

Complainant compares the class rates from San Francisco and Los Angeles, representative California points of origin, to Douglas, with the corresponding rates to Tucson, Willcox, Deming, and El Paso, typical distributing points which compete with Douglas. Complainant's comparisons, together with class rates from the same points of [135] origin to certain other destinations near Douglas, are shown in the subjoined statement:

Haul	Distance	Classes.									
		1	2	3	4	5	A	B	C	D	E
San Francisco and group to—	Miles	Cts.	Cts.	Cts.	Cts.	Cts.	Cts.	Cts.	Cts.	Cts.	Cts.
Tucson, Ariz.	971	237.5	196.5	171.5	142.5	116.5	116.5	95	81.5	75	65
Benson, Ariz.	1,020	269	225	200	167.5	137.5	137.5	114	99	90	76.5
Fairbank, Ariz.	1,038	269	225	200	171.5	141.5	141.5	115	99	90	77.5
Willcox, Ariz.	1,062	269	225	200	181.5	147.5	156.5	122.5	104	94	80
Bowie, Ariz.	1,085	269	225	200	181.5	147.5	159	126.5	104	96.5	81.5
Olga, Ariz.	1,094	269	225	200	181.5	147.5	159	130	104	97.5	82.5
Lordsburg, N. Mex.	1,135	269	225	200	181.5	147.5	159	134	104	100	87.5
Deming, N. Mex.	1,195	269	225	200	181.5	147.5	159	134	104	100	87.5
El Paso, Tex.[1]	1,283	294	250	200	181.5	147.5	159	134	104	100	87.5
Do.[2]	1,312										
Douglas, Ariz.	1,095	294	250	200	181.5	147.5	159	130	104	97.5	82.5
Bisbee, Ariz.	1,080	294	250	200	181.5	147.5	159	126.5	104	95	81.5
Osborn, Ariz.	1,073	294	250	200	181.5	147.5	159	126.5	104	95	80

Haul	Distance	Classes.									
		1	2	3	4	5	A	B	C	D	E
Los Angeles and group to—	Miles	Cts.	Cts.	Cts.	Cts.	Cts.	Cts.	Cts.	Cts.	Cts.	Cts.
Tucson, Ariz.	502	206.5	171.5	152.5	124	104	104	82.5	69	62.5	52.5
Benson, Ariz.	551	237.5	204	181.5	149	125	125	101.5	86.5	77.5	64
Fairbank, Ariz.	570	237.5	204	182.5	152.5	129	129	102.5	86.5	77.5	65
Willcox, Ariz.	593	237.5	204	182.5	167.5	135	144	110	92.5	81.5	67.5
Bowie, Ariz.	617	237.5	204	182.5	167.5	135	146.5	114	94	84	69
Olga, Ariz.	625	237.5	204	182.5	167.5	135	146.5	117.5	95	85	70
Lordsburg, N. Mex.	667	237.5	204	182.5	167.5	135	146.5	124	104	94	75
Deming, N. Mex.	726	237.5	204	182.5	167.5	135	146.5	129	104	94	75
El Paso, Tex.[1]	814	294	250	189	167.5	135	146.5	129	104	94	82.5
Do.[2]	843										
Douglas, Ariz.	626	285	245	189	167.5	135	146.5	117.5	95	85	70
Bisbee, Ariz.	611	275	236.5	189	167.5	135	146.5	114	92.5	82.5	69
Osborn, Ariz.	604	272.5	234	189	167.5	135	146.5	114	92.5	82.5	67.5

[1] Via Southern Pacific.

[2] Via Southern Pacific and El Paso & Southwestern

On traffic to the above points the San Francisco rate is blanketed over an origin territory about 400 miles in length, while the Los Angeles rate covers points within a radius of about 125 miles. Complainant not only contends that the rates to Douglas are too high from all points in these groups, but that greater reductions should be made from points in the eastern portion of the originating territory than from points in the western portion. This extensive grouping of points of origin gives interior points the benefit of many markets in Pacific coast territory. Moreover, any change in the basis to Douglas, such as is suggested, would result almost inevitably in a similar disturbance of the rates to many other points in Arizona and the southwest, which rates are not in issue here. The evidence of complainant as to the desirability of breaking up these origin groups is too slight to warrant findings of such far-reaching importance.

As the above table shows, destination points are also extensively grouped, rates from San Francisco and Los Angeles to El Paso being blanketed back, in many instances, to and beyond Douglas. The distance Los Angeles to Douglas is 74.2 per cent of the distance [136] Los Angeles to El Paso via Southern Pacific, Tucson, El Paso & Southwestern beyond, and 77 per cent of the distance over the direct line of the Southern Pacific, while the class rates from Los Angeles to Douglas range from 84.7 to 100 per cent of the rates to El Paso. From San Francisco the distances to Douglas are 83.5 and 85.4 per cent of the respective distances to El Paso,

while the Douglas rates vary from 94.3 to 100 per cent of the El Paso rates. Complainant insists that the factor of distance should be given more weight in this destination adjustment. Defendants assert that the San Francisco-El Paso rates are depressed by the rates from St. Louis. There is little doubt but that the rates to El Paso are subject to certain competitive influences which do not affect the rates to Douglas.

Class rates from the San Francisco and Los Angeles groups are generally blanketed to points on the line of the Southern Pacific between Benson and Deming, the extent of the blankets varying with the different classes and narrowing as the lower classes are reached. The first five classes are grouped from San Francisco for average distances of about 240 miles, and from Los Angeles for average distances of about 215 miles. For example, from San Francisco the first-class rate is blanketed from Amole, Ariz., to Afton, N. Mex., a distance of 239 miles; from Los Angeles the first-class rate is blanketed from Amole to Carne, N. Mex., a distance of 199 miles. The mean point of the blankets is near Lordsburg, N. Mex., this point being 41 miles farther from the origin territory than is Douglas. From San Francisco, as will be noted from the foregoing table, the rates on classes D and E are higher to Lordsburg than to Douglas, while on the first two classes the reverse is true. The other classes are the same. From Los Angeles classes B, C, D, and E are higher to Lordsburg than to Douglas, while the first three classes are considerably lower. The intermediate

classes, 4, 5, and A, are the same to both destinations. From both San Francisco and Los Angeles the first five classes are blanketed from Willcox to Deming, a distance of 133 miles. From Los Angeles classes 1, 2, and 3 are 47.5, 41, and 6.5 cents higher, respectively, to Douglas than to Lordsburg; and from San Francisco classes 1 and 2 are each 25 cents higher to Douglas. The defendants offered no explanation of these inconsistencies.

In the following statement the differences in the rates from California, Douglas under El Paso, and Los Angeles under San Francisco are compared with similar differences in connection with the rates to Lordsburg: [137]

	Classes.									
	1	2	3	4	5	A	B	C	D	E
From Los Angeles:										
Douglas under El Paso	9	5	0	0	0	0	11.5	9	9	12.5
Lordsburg under El Paso	56.5	46	6.5	0	0	0	5	0	0	7.5
From San Francisco:										
Douglas under El Paso	0	0	0	0	0	0	4	0	2.5	5
Lordsburg under El Paso	25	25	0	0	0	0	0	0	0	0
Los Angeles under San Francisco:										
To Douglas	9	5	11	14	12.5	12.5	12.5	9	12.5	12.5
To Lordsburg	31.5	21	17.5	14	12.5	12.5	10	0	6	12.5

From the above comparisons it will be observed that the spread between the rates to Douglas and the rates to El Paso, where there is any spread, is greatest in the lower classes, which is contrary to accepted principles of rate making. The reverse is true of the Lordsburg rates. These discrepancies are reflected in the differences between the San Francisco and Los Angeles rates to Douglas. The distance to Douglas from San Francisco exceeds that from Los Angeles by 469 miles. To Lordsburg rates from Los Angeles range from 31.5 cents, first class, to nothing at class C under the San Francisco rates. Moreover, to stations on the El Paso & Southwestern, Tucson to Osborn, including Bisbee, the first-class rates from Los Angeles range from 19 to 31.5 cents under the corresponding rates from San Francisco. Defendants urge that rates from northern California to Douglas are affected by water competition between San Francisco and Los Angeles. However, this fact does not explain the inconsistency between the Douglas rates on the three highest classes and corresponding rates to comparable Southern Pacific and El Paso & Southwestern points. Water competition should affect like rates similarly to all points in the same general territory.

Complainant compares the revenues per ton-mile yielded by the first-class rates from San Francisco and Los Angeles to Douglas with earnings under the corresponding rates to Tucson, Willcox, Deming, and El Paso, as follows:

From—	To Tucson.	To Willcox.	To Douglas.	To Deming.	To El Paso.
	Mills	Mills	Mills	Mills	Mills
Los Angeles	82.27	80.10	91.05	65.43	[1]69.75 [2]72.23
San Francisco	48.92	50.66	53.70	45.02	[1]44.82 [2]45.83

1. Via El Paso & Southwestern. 2. Via Southern Pacific.

The distances from California points to Douglas range from 500 to 1,200 miles. The haul to Douglas involves one additional line not [138] required in the movement to cross-country points on the Southern Pacific. Defendants contend that this fact alone is sufficient to warrant the higher basis at Douglas. They do not explain why this fact, if controlling, affects only a few of the higher classes, nor why the rates in some of the lower classes are less to Douglas than to Deming and certain other of the cross-country points. They offered no evidence to show that the added line to Douglas involves an increase in the cost of service over that to comparable Southern Pacific points, and the record discloses no other transportation conditions which would warrant the maintenance of higher rates to Douglas. As said in Coakley v. Director General, 59 I. C. C., 141, 144, "the mere fact that one haul is two-line and another one-line does not in and of itself justify a higher charge for the two-line haul." It is well established that for distances in excess of 500 miles the fact that the service is by two lines is largely negligible. Pacific Creamery Co. v. S. P. Co., 42 I. C. C., 93, 96.

From the facts of record it seems clear that the rates to Douglas on classes 1 and 2 from the San Francisco group and classes 1, 2, and 3 from the Los Angeles group are unduly prejudicial to Douglas, to the undue preference of Willcox, Bowie, Deming, and other competing cross-country points on the Southern Pacific to which the corresponding class rates are blanketed.

Complainant's main contention as to commodity rates is that the location of Douglas, 217 miles west of El Paso, entitles it to rates proportionately lower than are contemporaneously applicable to El Paso. It shows that rates from the east on various commodities, including canned goods, sugar, and soap, are considerably higher to Douglas than to El Paso, and urges that the converse should be true on traffic from the west.

Commodity rates to Douglas are generally the same from both Los Angeles and San Francisco, and in some instances they apply also from Portland, Oreg. Except to points on the El Paso & Southwestern, the blankets of origin on certain commodities extend to Seattle, Tacoma, and other Washington points. The rates in many instances are blanketed, as to points of destination, practically across the country. Rates of 90.5 cents on canned goods and 87.5 cents on canned salmon are blanketed from Gila, Ariz., to the Atlantic seaboard; and the rate of $1.065 on dried fish extends east from Maricopa, Ariz., in similar manner. Rates on canned milk, beans, sugar, and coffee are the same from San Francisco and Los Angeles to Douglas, El Paso,

and beyond. In a few instances commodity rates from San Francisco and Los Angeles are graded to Douglas and other points in the same general territory. [139]

From the numerous comparisons submitted it appears that the commodity rates from California to Douglas, while higher in some instances than those to competing points, are generally the same. As mining is the principal industry of this section, there is a considerable movement of mine timbers and high explosives from California to Bisbee and Douglas. The rate on mine timbers, from Los Angeles is 27 cents to Bisbee and 32.5 cents to Douglas; from San Francisco the rate is 39 cents to Bisbee and 48.5 cents to Douglas. On high explosives the rate is $2.43 from San Francisco to Douglas and $2.365 to Bisbee. Obviously Douglas is at a disadvantage in the distribution of these commodities in competition with Bisbee. Similar adjustments obtain in connection with a few other commodities. The record shows that there are certain commodities, such as salt and rough timbers, which take higher rates from California to Douglas than to cross-country points on the Southern Pacific which compete with Douglas in the intermediate territory.

Defendants state that the rates to all points on the El Paso & Southwestern are made on the lowest combination of locals, the transcontinental rates being held as maxima to avoid fourth section violations, and this, they contend, gives that section better rates than it is rightfully entitled to. They

deny any intention of favoring Bisbee over Douglas, and explain that the rate adjustment to Bisbee was made when it was a main-line point; that when Bisbee became a branch line point, its rates were allowed to remain, in most instances, on the main line basis. They urge that the length of time that the adjustment has been in effect justifies its continuance; that the rates to Bisbee are reasonable and should not be disturbed; and that the rates to Douglas, because of the greater distance, may reasonably be higher.

Traffic from the west destined to Bisbee must be switched out of main-line trains at Osborn, or Don Luis and hauled over a branch line about 7 miles in length, with a maximum grade of 3 per cent. The altitudes of Osborn, Bisbee, and Douglas are 4,675, 5,300, and 3,966 feet, respectively. The haul from Osborn to Douglas is down grade practically all the way. From these facts it is clear that the additional distance of 15 miles, Douglas to Bisbee, does not warrant a difference in the rates from California for distances ranging from 500 to 1,200 miles. And the record discloses no good reason why in those few instances where higher rates apply to Douglas than to Lordsburg and other cross-country points taking the same rates, a like parity should not be brought about.

This same general situation obtains with respect to a number of commodity rates from the northwest, Bisbee, in such cases, being [140] accorded lower rates than Douglas. Furthermore, as joint rates

are published from the northwest on certain commodities to El Paso via the Southern Pacific direct, and are not applicable in connection with the El Paso & Southwestern, it happens in these instances that the rates to Douglas, being on a combination basis, are higher. For example, from Seattle, Tacoma, and other northwestern points to El Paso, Southern Pacific points in Arizona and New Mexico, and points east thereof, the rates on canned goods are 90.5 cents, minimum 60,000 pounds, and $1.065, minimum 40,000 pounds, while the rates to Douglas are 15 cents higher. From Anacortes, Bellingham, Blaine, and other Washington points the rate on canned salmon to El Paso is 87.5 cents. This rate is blanketed from Colton, Calif., to the Atlantic seaboard, being applicable to Tucson, Willcox, Bowie, and other Southern Pacific points which compete with Douglas, while to the latter point the rates are considerably higher, being made on Portland combination. The rates on various other commodities are similarly adjusted. As hereinbefore stated, complainant agreed that as to rates from the northwest its complaint would be satisfied if Douglas were accorded the El Paso basis, but in no case higher than the rates contemporaneously maintained to Bisbee, and we see no reason why, with respect to rates applying via California junctions, this adjustment should not be made.

Many of the commodity rates from the northwest to El Paso and transcontinental territory, however, apply only via Utah and Colorado junctions, and rates so limited do not apply to points west of El

Paso. Complainant contends that all of these rates should be made to apply by way of California junctions and the El Paso & Southwestern, so that Douglas may have the benefit of the El Paso basis. No sufficient reason is shown of record for requiring the establishment of these rates to Douglas via California junctions.

Complainant submitted evidence intended to show that the application from California to Douglas of class rates on certain commodities, higher than commodity rates contemporaneously in force on like traffic from similar points of origin to transcontinental destinations east of Douglas produces violations of the long-and-short-haul clause of the fourth section of the act. Attention is also directed to the fact that the mixtures on certain traffic moving under commodity rates from California points to Douglas in mixed carloads, are restricted as compared with the mixtures permitted on similar traffic moving to points in transcontinental territory east of Douglas. These transcontinental commodity rates are published subject to rule 77 of Tariff Circular 18-A, which is a substantial compliance with the requirements of the fourth section. Du Pont de Nemours & Co. v. Director General, 55 I. C. C. 247. [141]

Complainant compares the rates assailed with rates from Chicago, Kansas City, Denver, and other points to El Paso, from Pacific coast points to Utah common points, and between other points, for the purpose of showing the unreasonableness of the rates to Douglas. These comparisons, however, have little

probative value, as they apply on traffic which in most instances is highly competitive and subject to influences not present in the movement from the Pacific coast to Douglas.

Complainant urges that the minimum weights applicable on certain commodities from California points to Douglas are unreasonable and unduly prejudicial because they are higher than those which apply on the same commodities between California and Denver, between California and Utah common points, and from Chicago, Denver, New Orleans, and other points to El Paso. The minimum weights under attack are also applicable from California to El Paso, Bisbee, and Southern Pacific cross-country points which are in competition with Douglas. No evidence was submitted as to the actual loading or other pertinent factors affecting the minima assailed or those compared; and no showing is made that Douglas is affected adversely by the difference in minimum weights.

The Santa Fe meets the Southern Pacific rates from California to Douglas via its circuitous route through Deming. Complainant contends that through routes should be established from points on the Santa Fe in California to Douglas, either via Santa Fe to Colton, Southern Pacific and El Paso & Southwestern beyond, or via Santa Fe to Phoenix, Arizona Eastern, Southern Pacific, and El Paso & Southwestern beyond. The principal reason advanced to support this request is that the time consumed in the movement via the Deming route is excessive. Complainant submitted a number of

California originating points as representative, all of which have through routes and joint rates in connection with the Southern Pacific. Complainant was unable to name any California points from which joint rates do not apply to Douglas via the Southern Pacific over direct routes. The evidence on this point is meager and indefinite, and fails to support the contention that the through routes from California points to Douglas are not reasonably adequate.

No evidence was submitted to support the allegation under section 2 of the act.

It is clear that there is a closer geographical and economic relationship between Douglas, Bisbee, and cross-country points on the Southern Pacific than is reflected in some of the class and commodity rates from California, and in certain of the commodity rates from the northwest to those points, and that defendants' present rate ad- [142] justment to this extent unduly prejudices Douglas and unduly prefers Bisbee and certain Southern Pacific points. No sufficient evidence has been presented that the rates attacked are unreasonable, or that they are unduly prejudicial by reason of the fact that they are not lower than the corresponding rates to El Paso. This finding is confined to the strict issue before us and to the evidence of record and is not to be understood as direct or indirect approval of the adjustment under which certain commodity rates eastbound are blanketed from Arizona points all the way to the Atlantic seaboard.

Upon the record we find that the rates assailed are not unreasonable or unjustly discriminatory, but that the class rates from points on lines of defendants in California to Douglas are, and for the future will be, unduly prejudicial to the extent that they exceed or may exceed the class rates contemporaneously maintained from the same points of origin to Bisbee, Ariz., and to Lordsburg, N. Mex., and points on the Southern Pacific taking the same rates as Lordsburg; that the commodity rates, except on fresh fruits and vegetables, from said points in California to Douglas are, and for the future will be, unduly prejudicial to the extent that they exceed or may exceed the rates contemporaneously maintained on like commodities from the same points of origin to Bisbee, Ariz., and to Lordsburg, N. Mex., and points on the Southern Pacific taking the same rates as Lordsburg; that commodity rates, except on fresh fruits and vegetables, from points on lines of defendants in Oregon and Washington and points basing thereon, to Douglas, applicable via California junctions, are, and for the future will be, unduly prejudicial, to the extent that they exceed or may exceed the rates contemporaneously maintained on like commodities from the same points of origin to El Paso, Tex., and to Bisbee, Ariz. The foregoing finding should not be construed as covering rates from British Columbia, as no evidence is before us respecting the rates covering that portion of the haul within the United States.

An order will be entered in accordance with these findings. [143]

ORDER.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 4, held at its office in Washington, D. C., on the 3d day of November, A. D. 1921.

No. 11442.

Traffic Bureau of the Douglas, Ariz., Chamber of Commerce and Mines,

v.

The Atchison, Topeka & Santa Fe Railway Company; Camas Prairie Railroad Company; Chicago, Milwaukee & St. Paul Railway Company; El Paso & Southwestern Company; El Paso & Southwestern Railroad Company of Texas; The Galveston, Harrisburg & San Antonio Railway Company; The Great Northern Railway Company; Los Angeles & Salt Lake Railroad Company; Northern Pacific Railway Company; Northwestern Pacific Railroad Company; Oregon Short Line Railroad Company; Oregon Trunk Railway Company; Oregon-Washington Railroad & Navigation Company; Pacific Coast Railroad Company; Rio Grande, El Paso & Santa Fe Railroad Company; Southern Pacific Company; Southern Pacific Company—Atlantic Steamship Lines; Spokane, Portland & Seattle Railway Company; Sunset Railway Company; Tidewater Southern Railway Company; Virginia & Truckee Railway; The Western Pacific Railroad Company; Bay Point & Clayton Rail-

road Company; British Columbia Electric Railway Company, Limited; California Central Railroad Company; California Western Railroad & Navigation Company; Canadian National Railways; The Canadian Pacific Railway Company; Cement, Tolenas & Tidewater Railway; Chelsea Tug & Barge Company; Clatskanie Transportation Company; Coeur d'Alene & Pend d'Oreille Railway Company; Coeur d'Alene & St. Joe Transportation Company; Crows Nest Southern Railway Company; Diamond "O" Navigation Company; Frank Waterhouse & Company; Haekins Transportation Company; Hartford Eastern Railway Company; Inland Empire Railroad Company; Island Belt Steamship Company; J. Kellog Transportation Company; James & Marmont; McCloud River Railroad Company; Nelson & Fort Sheppard Railway Company; Pacific Electric Railway Company; Pacific Northwest Traction Company; Pacific Steamship Company; Portland Railway, Light & Power Company; Puget Sound Navigation Company; Sacramento Northern Railroad; San Diego & Arizona Railway Company; San Francisco-Sacramento Railroad Company; Santa Maria Valley Railroad Company; Sierra Railway Company of California; Skagit River Navigation & Trading Company; Skinner Car Ferry Company; Spokane & Eastern Railway & Power Company; Spokane International Railway Company; Tijuana & Tecati Railway Company; Trona Railway Company; Vancouver-Victoria & Eastern

Railway & Navigation Company; Visalia Electric Railroad Company; Walla Walla Valley Railway [144] Company; Washington, Idaho & Montana Railway Company; Western Transportation Company; Yakima Valley Transportation Company; and Yosemite Valley Railroad Company.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and said Division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before February 21, 1922, and thereafter to abstain, from publishing, demanding, or collecting class rates, and commodity rates, except on fresh fruits and vegetables, from points on the lines of the defendants in California, and commodity rates, except on fresh fruits and vegetables, from points on the lines of the defendants in Oregon and Washington and points basing thereon, to Douglas, Ariz., which shall exceed the class and commodity rates prescribed in the next succeeding paragraphs.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before February 21, 1922, upon no-

tice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply class rates, and commodity rates, except on fresh fruits and vegetables, from points on the lines of the defendants in California to Douglas, Ariz., which shall not exceed the class rates and corresponding commodity rates contemporaneously in effect from the same points of origin to Bisbee, Ariz., Lordsburg, N. Mex., and points on the Southern Pacific taking the same rates as Lordsburg.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby notified and required to establish, on or before February 21, 1922, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply commodity rates, except on fresh fruits and vegetables, from points on the lines of said defendants in Oregon and Washington, and points basing thereon, to Douglas, Ariz., via California junctions, which shall not exceed corresponding commodity rates contemporaneously in effect from the same points of origin and [145] applicable via said California junctions to El Paso, Tex., and Bisbee, Ariz.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission, Division 4.

[Seal] GEORGE B. McGINTY,
Secretary. [146]

Thereupon there was offered in evidence by defendants, and received as Exhibit "D", a true and correct copy of the report and order of said Commission in Docket 13139, Graham etc. Traffic Assn. v. A. E. R. Co., et al., 81 I. C. C. 134, in words and figures, as follows: [161]

EXHIBIT "D"

No. 13139.

GRAHAM & GILA COUNTIES TRAFFIC ASSOCIATION v. ARIZONA EASTERN RAILROAD COMPANY ET AL.

Submitted January 24, 1923. Decided June 27, 1923

Class and commodity rates to points on the Globe division of the Arizona Eastern Railroad from interstate points east and west thereof found not unreasonable but found unduly prejudicial. Undue prejudice ordered removed.

Lloyd F. Jones and F. A. Jones for complainant.

Fred H. Wood, James R. Bell, C. W. Durbrow, Elmer Westlake, J. E. Lyons, George P. Bullard, and Henley C. Booth for defendants.

D. R. Johnson for Arizona Corporation Commission; and O. T. Helpling for Riverside Portland Cement Company, interveners.

REPORT OF THE COMMISSION.

Division 2, Commissioners Daniels, Esch, and Campbell.

Esch, Commissioner:

A report was proposed by the examiner, to which

exceptions were filed by defendants, and oral argument thereon was heard by us.

In Graham & Gila County Traffic Asso. v. A. E. R. R. Co., 40 I. C. C., 573, submitted November 6, 1914, and decided July 7, 1916, the complainant attacked, as unreasonable, unjustly discriminatory, unduly prejudicial, and in violation of the aggregate-of-intermediates clause of the fourth section, commodity rates from points in California and class and commodity rates from eastern transcontinental groups to points in Arizona on the Globe division of the Arizona Eastern Railroad. We declined to consider the allegations of unjust discrimination and undue prejudice because of lack of particularity in the complaint. We further held that the rates in effect were not unreasonable and that the alleged violation of section 4 was without basis, because there was in effect a rule that where the aggregate of the intermediate rates made less than the joint through rate the former should be applied as the lawful rate. The same rule has since been and is now in effect.

The complaint in the instant case, brought by the same complainant, renews the charges made in the former case, also brings in issue the class rates from California and the class and commodity [148] rates from points in Oregon and Washington, and alleges undue preference of El Paso, Tex., Phoenix, Mesa, Florence, Superior, and Flagstaff, Ariz., and other destinations taking relatively lower rates than points on the Globe division. Under the last allegation complainant introduced evidence tending to

show undue preference of Ajo, Sasco, and Nogales, Ariz., and Cananea, Mexico, without objection by defendants, who also introduced evidence intended to disprove any undue preference of those points. Upon oral argument defendants objected to any finding of undue preference of the last-named points as beyond the issues. They do not claim to have been put at any disadvantage by the failure to specifically name these points in the complaint, and the objection is not sustained. The Arizona Corporation Commission intervened in support of the complaint, and the Riverside Portland Cement Company with respect to the rates on cement from California. The alleged violations of sections 2 and 4 of the act are not supported by the evidence and need not be considered further.

The report in the former case sets forth a complete description of the general bases of rates to points on the Globe division as compared with rates to numerous alleged favored points, the relative distances, the industrial, agricultural, traffic, and transportation conditions, and other pertinent matters. The present report, therefore will deal mainly with changes brought about since the decision in the prior case, amplification of certain matters discussed in the former report, in the light of the present comprehensive record, and with the new issue of undue prejudice and preference.

From 1910 to 1920 the population of Arizona increased from 204,354 to 333,273, from 1.86 to 2.91 per square mile, and from 102.46 to 140.17 per mile of railroad. The principal industries of the State

are copper mining and the raising of live stock. Prior to 1920 cotton was also produced extensively and normally is one of the principal products of the State. Other farm or ranch products produced in considerable quantity are alfalfa, wheat, oats, barley, fruit, and dairy products. There are only a few manufactured products. All of the stations on the Arizona Eastern are in Arizona.

At the present time there are about 30,000 acres of irrigated and cultivated land along the Globe division in the Gila Valley. There has been no considerable increase in the irrigated area in this district since 1914. On the other hand, since 1914, the irrigated area in the Salt River Valley, of which Phoenix is the center, has increased from approximately 188,000 acres to 267,400 acres. There is much divergence between the parties as to the nature and relative quantity of traffic handled by the Globe and Phoenix divisions of the Arizona Eastern. The following table compares the tonnage [149] interchanged with the Southern Pacific at Maricopa and Bowie, its junctions with the Phoenix and Globe divisions, respectively, during the four years preceding 1922:

	1918		1919		1920		1921	
	Globe division	Phoenix division	Globe division	Phoenix division	Globe division	Phoenix division	Globe division[1]	Phoenix division
To Southern Pacific.								
Ore and bullion	182,815	183,497	87,236	44,562	85,307	38,151	29,018	7,557
Live stock	7,950	12,802	2,600	11,524	6,079	9,629	5,653	7,123
Agricultural products	17,155	77,414	24,614	93,967	34,095	33,652	22,440	47,431
All other	15,523	32,471	38,019	37,240	2,376	28,252	8,063	20,132
Total	223,443	306,184	152,469	187,293	127,857	109,684	65,174	82,243
From Southern Pacific.								
Oil	202,663	158,903	169,320	97,439	175,727	92,546	58,352	55,888
Forest products	49,842	59,374	30,314	43,925	58,012	52,389	11,405	15,633
Iron and steel	10,048	5,045	5,642	4,678	14,396	8,214	1,858	5,515
Machinery	1,860	4,400	1,369	1,718	2,283	3,087	1,720	565
Coal and Coke	38,628	1,331	26,208	718	38,835	499	11,904	268
Ore and bullion	43,696	11,252	22,693	18,005	14,098	23,298	3,142	2,523
All other	43,355	78,520	58,634	79,504	47,869	119,906	33,294	112,143
Total	390,092	318,825	309,180	245,987	351,220	299,939	121,675	192,535
Ttl. tonnage handled	613,535,	625,009	461,649	433,280	479,077	409,623	186,849	274,778

[1] Figures for January 1 to November 30 only.

The sharp decline in agricultural products delivered to the Southern Pacific at Maricopa in 1920 was due to the depression in the cotton industry that year, the cotton crop prior to that time having comprised a large proportion of the agricultural tonnage from the Salt River Valley.

While it still appears, as stated in the former report, that the Globe division "is dependent chiefly upon products of the mines for its revenue," it is evident that the Phoenix division is also dependent upon mines for a large part of its tonnage. Moreover, while the tonnage of agricultural products and live stock moving over the Globe division is not as large as that over the Phoenix division, nevertheless it is considerable and affords a permanent source of revenue. The foregoing table shows also that the total tonnage hauled does not vary greatly as between the two divisions. The total traffic handled over either division has not shown a steady increase since 1913 but has fluctuated widely from year to year, in which respect it has followed the general trend of traffic on the Southern Pacific in Arizona.

The evidence presented herein confirms what was said in the former report relative to the difficult transportation conditions prevailing on the Globe division. The maximum grade on that division is 3.5 per cent, from Miami to Live Oak, 2.5 miles. Other grades [150] are, from Globe to Pinal, 2.28 miles, 2.3 per cent; from Cutter to Pinal, in the opposite direction, 5.6 miles, 2.2 per cent; and from San Carlos to Bowie, 92.5 miles, a maximum of 1

per cent. The maximum grade on the Phoenix division between Maricopa and Phoenix is 0.49 per cent, from Sacate to Maricopa, 8 miles; on the Buckeye branch of the Phoenix division between Phoenix and Hassayampa, 0.5 per cent for about 16 miles; and on the Phoenix & Eastern Railroad under lease by the Arizona Eastern, between Phoenix and Winkelman, except for about 500 feet through a tunnel, 0.52 per cent. Maximum grades on the main line of the Southern Pacific are, between Aurant, Calif., and Yuma, Ariz., 2 per cent; between Yuma and Tucson, Ariz., 1 per cent; and between Tucson and Rio Grande, N. Mex.-Tex., 1.4 per cent.

From 1913 to 1920, inclusive, the net railway operating income of the Arizona Eastern, including the Phoenix & Eastern, yielded from 1.374 to 8.699 per cent on its book value. In the first 11 months of 1921 it sustained an operating deficit of $65,513.58. The operating ratio for the period from 1913 to November 30, 1921, ranged from 50.01 to 88. On June 30, 1915, the Arizona Eastern and the Phoenix & Eastern combined had a book value of $19,227,648.08, while their tentative valuation as of the same date has been fixed by us at $13,392,214.

From 1913 to 1920, inclusive, the return on the book value of the Southern Pacific ranged from 3.22 to 5.37 per cent, and the operating ratio from 58.87 to 80.63. Pertinent statistics of rail-line operations of the Arizona Eastern, Southern Pacific, and other lines are compared below.

	Freight revenue per mile of road		Revenue ton-miles per mile of road		Operating ratio	
	1919	1920	1919	1920	1919	1920
Arizona Eastern	$7,566.18	$8,128.82	323,259	331,312	77.40	81.11
Southern Pacific:						
Arizona intrastate	24,030.16	24,812.35	2,229,502	1,926,483	70.31	66.09
System	15,926.39	17,678.01	1,217,959	1,249,139	76.22	80.57
Atchison, Topeka & Santa Fe:						
Arizona intrastate	15,081.33	17,185.42	1,247,126	1,324,167	70.11	83.07
System	14,358.80	16,235.97	1,147,410	1,186,479	72.54	82.82
El Paso & Southwestern:						
Arizona Intrastate	7,910.52	7,759.55	576,887	521,887	76.41	82.91
System	9,712.52	10,908.39	770,855	854,294	69.64	72.66
Chicago, Rock Island & Pacific	9,678.99	11,708.31	884,991	988,670	86.95	94.63

The annual rental paid by the Arizona Eastern to the Phoenix & Eastern for the use of the 91.86 miles of track of the latter between Phoenix and Winkelman in 1910 was $35,550.55, and has been increased in each successive year, except one, to and including 1920, when the amount paid was $230,-133.78. [151]

The rates hereinafter mentioned are those in effect at the time of the hearing, January 18, 1922, stated in cents per 100 pounds. Class rates from California points to points on the Globe division are made by combination on Bowie. To Ajo, terminus of the Tucson, Cornelia & Gila Bend Railroad, an independent line extending 44 miles from Gila Bend, Ariz., junction point with the Southern Pacific, joint through class rates are in effect, and

the difference between the rates to Gila Bend and to Ajo is only about 25 per cent of the local rates from and to the same points. To Nogales, on a branch line of the Southern Pacific, 66 miles from Tucson, junction point with the main line, rates on the first three classes are constructed by the use of arbitraries over the junction-point rates, which are materially lower than the local rates from Tucson to Nogales. Rates on other classes are constructed on the full combination. The main-line rates on all classes are extended to Mesa, on the Phoenix & Eastern Railroad, or so-called Hayden branch of the Arizona Eastern, 34 miles from Maricopa.

The situation as to commodity rates from California to points on the Globe division, as compared with rates to El Paso, Phoenix, and Nogales, is adequately set forth at pages 575-576 of the former report. Substantially the same relative situation exists to-day. It is sufficient here to call attention to the fact that the junction-point rates are generally extended to Ajo, Mesa, and Nogales, and on some commodities to Florence, which is 36 miles east of Mesa on the same line. On some commodities the rates are blanketed, not only to all main-line and many branch-line and independent-line points in Arizona, but also to eastern transcontinental Groups J to A, inclusive, so that the rates from California to points on the Atlantic seaboard are lower than to Globe division points in Arizona. For instance, the rate on dried fruits from Los Angeles, Calif., to Ajo, Mesa, Phoenix, and Nogales, to main-line points in Arizona, to El Paso, and to trans-

continental Groups J to A is $1.25, while to Safford, on the Globe division, it is $1.62, to Globe $1.94, and to Miami $1.97. On some commodities, comprising generally those used in the mining industry, the main-line rates or rates considerably lower than the combinations on Bowie have been extended to Globe division points.

On the other hand, defendants show that class and commodity rates from San Francisco, Calif., and Los Angeles to East Ely, Nev., on the Nevada Northern Railway, 140 miles from Cobre, Nev., junction point with the main line of the Southern Pacific from Ogden, Utah, to San Francisco, and to Tonopah, Nev., on the Tonopah & Goldfield Railroad, 71 miles from Hazen, Nev., junction point [152] with the same line of the Southern Pacific, are substantially higher than the junction-point rates. Comparisons between commodity rates from California to East Ely and Globe are discussed at page 578 of the former report. Both the Nevada Northern and the Tonopah & Goldfield are independent lines controlled by mining companies. Their traffic is largely derived from the mines which they serve, and that of the former is relatively light as compared with the Arizona Eastern.

Very little evidence was introduced regarding the rates from points in Oregon and Washington, but it appears that the situation there is similar to that with respect to the rates from California, at least on some commodities.

The situation as to class and commodity rates from eastern transcontinental groups to points on

the Globe division, as compared with those to mainline and branch-line points in Arizona, with rates to branch line points in California, and class rates to Winnemucca, Nev., is fully described in the former report at pages 580 to 586. Evidence presented by complainant in the instant case confirms much of what is there said and need not be reviewed in detail. It will suffice to direct attention to additional matters disclosed by the present record. The spread between the rates to points on the Globe division and other points indicated has, of course, been increased by the percentage increases made on June 25, 1918, and August 26, 1920.

The joint through rates to Globe division points are constructed by adding arbitraries to the joint through rates to Bowie, except on some commodities used in the mining industry. Until June 20, 1921, these arbitraries were generally the same as the local rates from Bowie. On that date a substantial increase was made in the local rates, but the arbitraries were not increased. By schedules filed to become effective May 15, 1922, defendants proposed to increase the arbitraries to a parity with the local rates, but upon protest by the complainant herein, the proposed increased rates were suspended in Investigation and Suspension Docket No. 1555. Subsequently defendants were permitted to cancel the suspended schedules, and the proceeding was discontinued.

Joint through commodity rates apply from eastern groups to Ajo and Sasco, which are generally only slightly higher than the mainline rates of the

Southern Pacific. Sasco is on the Arizona Southern Railroad, an independent short line, extending from Red Rock, Ariz., junction with the main line of the Southern Pacific to Silver Bell, Ariz., 21 miles. Sasco is about 8 miles from Red Rock. From the East commodity rates are generally maintained to Cananea, on the Southern Pacific of Mexico, 20 miles from Naco, Ariz., where that line connects with the El Paso & Southwestern, on a parity with [153] Bowie and other main-line points of the Southern Pacific in Arizona. The distance from Kansas City, Mo., to Cananea is 1,211 miles, as compared with 1,147 miles to Bowie and 1,271 miles to Globe.

The position taken by complainant is that where the rates are graded to points on the main line east and west of Bowie they should be similarly graded for like distances from Bowie to Globe division points, and where blanketed the junction-point rates should be extended to Globe division points not more distant from Bowie than the extent of the blanket from Bowie.

A number of witnesses engaged in business at various points on the Globe division testified as to the severe competition experienced from merchants and jobbers at points on the Phoenix division and on the Atchison, Topeka & Santa Fe, herein called the Santa Fe, who, by reason of their more advantageous freight rates, were able to haul their goods across country by truck and enter the markets at Globe division points. For the same reason such merchants and jobbers have been able to do

business at country points not served by rail lines, which are much nearer to the Globe division.

The effect of water competition upon the rates to Nogales and El Paso is referred to at page 584 of the report in the former case. It does not appear from the present record that any traffic has moved by water into Guaymas, Mexico, and from that point to Nogales for several years.

Defendants show that class rates from Kansas City, St. Louis, Mo., and Chicago, Ill., to East Ely and Tonopah are made by combination on the junction points; that rates from the same origin points to Clifton, Ariz., on a branch of the El Paso & Southwestern, formerly the Arizona & New Mexico Railroad, are generally only slightly less than the full combination on the junction point; and that rates to Paragon, Idaho, on a branch line of the Oregon-Washington Railroad & Navigation Company, 33 miles from Enaville, Idaho, junction point with the main line, are substantially higher than the junction-point rates. Complainant directs attention to numerous branch-line points in Idaho to which the main-line rates are applied. It is conceded that from the East the main-line rates are usually extended to branch-line points in California but defendants maintain that this is a situation that has been brought about through competitive influences beyond their control.

The rates to Cananea, Sasco, and Ajo were established and have been maintained by agreement or understanding between the Southern Pacific and the mining companies operating at those points. It

is said that the rates to Cananea have been held down by potential water competition through the port of Guaymas, and that it has been necessary to accord a favorable basis of rates to that point [154] because the mines located there have experienced great difficulty in keeping in operation. Practically all of the traffic moving to and from Cananea is incident to the mining industry at that point.

The agreement relative to the rates to and from Ajo was entered into prior to the construction of the Tucson, Cornelia & Gila Bend in 1915, and was made in view of the contemplated construction of that line by other routes which would have drawn the traffic away from the Southern Pacific. The relatively low rates accorded that point comprise not only rates on commodities essential to the mining industry but also on practically all class and commodity traffic. Defendants state that the rates to Sasco will probably be canceled, due to the dismantling of the plant at that point.

By understanding with the companies operating mines on the Globe division, joint through rates on mining supplies and products of the mines were originally established and have been maintained to points on that line. Defendants reiterate the explanation contained in the former report of their rate policy on the Globe division, viz:

> * * * that low rates on mining supplies and mining products are necessary to enable the mines at Globe and Miami to compete with other mines. To put it in another way, the

carriers contend that low rates on mining supplies and mining products are essential to the life of the mining community, but that such is not the case with respect to rates on the various other commodities included in the complaint.

At the hearing defendants stated that material reductions were being published, effective not later than April 15, 1922, in the rates on mining supplies from eastern transcontinental groups, which would establish generally a parity of rates thereon as between Globe division points, on the one hand, and Cananea, Ajo, Hayden, Clifton, and other branch-line and independent-line points in Arizona on the other hand. Among the principal articles embraced in this readjustment were cast-iron pipe, iron and steel articles of various kinds, mixing machinery, grinding balls, bolts, nuts, washers, spikes, boiler flues, boiler ends, boiler heads and cables. On forest products from California and Oregon to Arizona, and on petroleum oil from California, one-half of the general increase made on August 26, 1920, was to be removed and a similar parity established as between the points named. The rates on fuel oil from the midcontinent field were also to be reduced. The reductions on mining supplies and on coal and coke are experimental and of a temporary character. The entire increase of August 26, 1920, on coal and coke was removed on March 25, 1922. A reduction of 10 per cent has also been made in the rates on agricultural products.

Defendants, without admitting that the rates assailed are unreasonable or unduly prejudicial, stated

that, if we should find that [155] other rates must be reduced, the maximum reduction that should be required would be to establish joint through class and commodity rates to Globe division points from points east and west, based on the rates to Bowie and a reduction of one-third from the present local rates from Bowie. Complainant contends that such a readjustment would be inadequate and fail to remove the underlying causes of the complaint; that nothing has been shown in this proceeding to justify the charging of 66 2/3 per cent of the local rates to Globe division points and applying the junction-point rates, or rates only slightly higher, to numerous other points similarly situated.

The record in this proceeding shows that transportation conditions are without doubt somewhat more difficult over the Globe division than over the Phoenix division, but it can not be said that that difference is so pronounced as to warrant in itself a continuance of the existing inequalities as between the rates to points on those lines. Except as to Phoenix, defendants have failed to establish any such dissimilarity of conditions or other convincing reasons as to justify the present rate relation. Even as to Phoenix it should be remembered that the Southern Pacific does not in all instances have to meet the rates of the Santa Fe, but, on the contrary, the Santa Fe has to meet the rates of the Southern Pacific from many points of origin, because the latter is the direct and rate-making line.

The situation here presented is in all substantial respects similar to that considered by us in the recent case of State of Idaho ex rel. v. Director Gen-

eral, 66 I. C. C., 330. We there found that the maintenance of blanket commodity rates from and to Nampa, Idaho, main-line junction point on the Oregon Short line, and to Emmett and Boise, Idaho, on the Emmett and Boise branches, respectively, of the same carrier, lower than the rates contemporaneously maintained on like traffic from and to points on the Murphy and Wilder branches, was unduly prejudicial to the latter and unduly preferential of the former to the extent of the difference in such rates. A similar finding was made as to rates that were graded to points on those branches to the extent that the branch-line differentials on the Murphy and Wilder branches exceeded those maintained from and to points on the Emmett and Boise branches for like distances from the main-line junction.

The Southern Pacific owns practically all of the stock of the Arizona Eastern and, although the latter is separately operated, for rate-making purposes it may be considered as a branch line of the Southern Pacific. Smith v. I. C. R. R. Co., 68 I. C. C., 427; Arizona Corporation Commission v. A. E. R. R. Co., supra.

Defendants urge that no competitive relation has been made to appear as between the points considered herein. The record estab- [156] lishes a very definite competition existing as between certain of the points. In this connection attention may be directed to the decision in Intermediate Rate Asso. v. Director General, 61 I. C. C., 226, wherein the same contention was made. In that case we said:

> However, thriving communities, all in the same general section of the country, striving for population, industry, and business growth, may not need elaborate evidence to show that they are entitled to relief if the rates are not properly related.

The fact that rates to certain points are maintained under contract between the carriers and shippers does not affect our authority to require the carriers to desist from violations of the interstate commerce act. Ohio Rates, Fares, and Charges, 64 I. C. C., 493, Cape Girardeau Commercial Club v. I. C. R. R. Co., 51 I. C. C., 105. As in State of Idaho ex rel. v. Director General, supra, the record in the instant case does not support a finding of unreasonableness.

We find that the maintenance of class and commodity rates on interstate traffic from points in California, Oregon, and Washington and from eastern transcontinental groups to Ajo, Mesa, Florence, Sasco, and Nogales, Ariz., and other points on the Arizona Eastern and on branch lines of the Southern Pacific in Arizona, except competitive points located on lines of different carriers, and to Cananea, Mexico, in so far as the transportation takes place within the United States, not higher than the rates to the junction points with the main line of the Southern Pacific, and the refusal to maintain rates on a similar basis to Amster, Solomon, Safford, Thatcher, Pima, Fort Thomas, Globe, and Miami, Ariz., on the Globe division of the Arizona Eastern, is unduly prejudicial to the latter

points and unduly preferential of the former points to the extent that the rates to the Globe division points exceed the rates to the junction point.

We further find that the maintenance of class and commodity rates on interstate traffic, the rates on which are on a graded or mileage basis, from the points of origin described in the last paragraph to the said points on the Globe division higher for like distances than are contemporaneously maintained to Ajo, Mesa, Florence, Sasco, and Nogales, Ariz., and other points on the Arizona Eastern and on branch lines of the Southern Pacific in Arizona, and to Cananea, Mexico, in so far as the transportation takes place within the United States, is unduly prejudicial to the former points and unduly preferential of the latter points to the extent that the rates to the Globe division points exceed those contemporaneously maintained on like traffic to the other destination points described for like distances from the main-line junction. [157]

In the case of rates constructed according to the latter method, joint through rates should be established to all the branch-line and independent-line points involved based on the rates to the main-line junction point and a uniform percentage of the local rates beyond.

The Tucson, Cornelia & Gila Bend and the Arizona Southern are not parties defendant, and no order can, therefore, be issued against them, but it appears that the Southern Pacific controls the rates to Ajo and Sasco and that it can remove the undue prejudice and preference as to those points.

An appropriate order will be entered. [158]

ORDER.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D. C., on the 27th day of June, A. D. 1923.

No. 13139.

Graham & Gila Counties Traffic Association

v.

Arizona Eastern Railroad Company; The Atchison, Topeka & Santa Fe Railway Company; The Baltimore & Ohio Railroad Company; Boston & Albany Railroad Company and The New York Central Railroad Company, Lessee; The Chicago, Rock Island & Pacific Railway Company; The Chicago, Rock Island & Gulf Railway Company; The Colorado & Southern Railway Company; El Paso & Northeastern Railroad Company; El Paso & Southwestern Railroad Company; El Paso & Southwestern Company; El Paso & Southwestern Railroad Company of Texas; The Fort Worth & Denver City Railway Company; The Galveston, Harrisburg & San Antonio Railway Company; Louisville & Nashville Railroad Company; Morgan's Louisiana & Texas Railroad & Steamship Company; The New York Central Railroad Company; The Pennsylvania Railroad Company; Southern Pacific Company; Texas & New Orleans Railroad Company; and The Texas & Pacific Railway Company and J. L. Lancaster and Charles L. Wallace, Receivers.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and said division having found in said report that the maintenance of class and commodity rates on interstate traffic from points in California, Oregon, and Washington and from eastern transcontinental groups to Ajo, Mesa, Florence, Sasco, and Nogales, Ariz., and other points on the Arizona Eastern and on branch lines of the Southern Pacific in Arizona, except competitive points located on lines of different carriers, and to Cananea, Mexico, in so far as the transportation takes place within the United States, not higher than the rates to the junction points with the main line of the Southern Pacific, and the refusal to maintain rates on a similar basis to Amster, Solomon, Thatcher, Pima, Fort Thomas, Globe, and Miami, Ariz., on the Globe division of the Arizona Eastern, is unduly prejudicial to the latter points and [159] unduly preferential of the former points to the extent that the rates to the Globe division points exceed the rates to the junction point; and that the maintenance of class and commodity rates on interstate traffic, the rates on which are on a graded basis, from the said origin points and groups to the said points on the Globe division higher for like distances than are contemporaneously maintained to Ajo, Mesa, Florence, Sasco, and Nogales, and other points on the Arizona Eastern

and on branch lines of the Southern Pacific in Arizona, and to Cananea, in so far as the transportation takes place within the United States, is unduly prejudicial to the former points and unduly preferential of the latter points to the extent that the rates to the Globe division points exceed those contemporaneously maintained on like traffic to the other destination points described for like distances from the main-line junction:

It is ordered, That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before October 11, 1923, and thereafter to abstain, from practicing such undue prejudice and preference.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before October 11, 1923, upon notice to this commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply rates which will prevent and avoid the aforesaid undue prejudice and preference.

And it is further ordered, That this order shall continue in force until the further order of the commission.

By the commission, division 2.

[Seal] GEORGE B. McGINTY,
Secretary [160]

Thereupon defendants offered further testimony as follows:

TESTIMONY OF J. L. FIELDING:

Direct Examination:

(The qualifications of Witness Fielding were admitted by counsel for Plaintiff.)

"I am Assistant General Freight Agent of the Southern Pacific Company, with headquarters at San Francisco, and prior experience in Arizona and at El Paso, Texas. I am familiar with the rates from California to Bowie, Arizona, and have in my possession tariffs which show past and present rates on sugar, in carloads, from California points involved in this case to Bowie. I have prepared three statements relating to those rates, which have been checked by me against the tariffs, and are true and correct to the best of my knowledge and belief. The tariffs to which reference is made were lawfully on file with the Interstate Commerce Commission during the period shown."

Thereupon, there were offered in evidence, through said Witness Fielding, the statements referred to by the witness; which were marked, identified and received as Defendants' Exhibits "E", "F" and "G", and were and are in words and figures as follows: [162]

STATEMENT SHOWING COMPLETE CHRONOLOGICAL HISTORY OF CARLOAD RATES ON SUGAR FROM NORTHERN CALIFORNIA SHIPPING POINTS, VIZ: SAN FRANCISCO, CROCKETT AND SPRECKELS, CALIF., TO BOVIE, ARIZONA, DURING THE PERIOD APRIL 15th, 1914 TO AND INCLUDING JUNE 11, 1928.

UNITED STATES DISTRICT CO...
(ARIZONA) Case No. L-763
Exhibit No. E
Sheet No. 1

LINE	EFFECTIVE DATE OF CHANGE IN RATES	Rate in cents per 100 lbs.	Minimum Weight (Lbs).	Rate in cents per 100 lbs.	Minimum Weight (lbs).	TARIFF REFERENCE ISSUED BY	TARIFF NUMBER	I.C.C. NUMBER	REMARKS
1.	April 15, 1914	70	36000	-	-	Sou. Pac. Co.	612-B	3632	
2.	November 15, 1914			55	60000	" " "	"	"	Voluntary Reduction.
3.	April 27, 1915	60	36000	-	-	" " "	"	"	Voluntary reduction in rate
4.	May 25, 1915	60	36000	55	60000	" " "	"	"	No change involved. Rates found reasonable in I.C.C. Docket 6806 (34 ICC 158) decided May 25, 1915).
5.	June 25, 1918	75	36000	69	60000	" " "	"	"	25% Increase Director General's Order No. 28.
6.	November 25, 1919	82	36000	77	60000	" " "	"	"	22½ flat increase, T.M.A. [illegible] General Order No. 28.
7.	February 29, 1920	-	-	77	60000	" " "	612-C	4077	82½ rate, minimum 36000 lbs., cancelled, FRA 15797.
8.	August 26, 1920	-	-	96½	60000	" " "	"	"	25% increase: "Ex Parte 74" (58 ICC 220).
9.	July 27, 1921	-	-	96	60000	" " "	612-D	4172	Voluntary reduction.
10.	July 1, 1922	-	-	86⅔	60000	" " "	"	"	10% voluntary reduction: "Reduced Rates 1922"
11.	January 11, 1924	-	-	84	60000	" " "	612-F	4442	Voluntary reduction.
12.	October 27, 1925	-	-	75	60000	" " "	612-G	4497	Rate prescribed by I.C.C. in Docket 14140 (101 ICC 667).
13.	June 11, 1928	-	-	84	60000	F. W. Gomph, Agent	26-N	885	Rate prescribed by ICC in Docket 15742 (140 ICC 171).

E-763-Pet.
Plaintiff's Exhibit
No. F
Solomon Isham

STATEMENT SHOWING RATES ASSESSED ON CARLOADS OF SUGAR FROM NORTHERN CALIFORNIA POINTS VIZ: SAN FRANCISCO AND SPRECKELS, CALIFORNIA TO BOWIE, ARIZONA AND EARNINGS THEREUNDER; RATES WHICH THE INTERSTATE COMMERCE COMMISSION DECLARE REASONABLE FOR APPLICATION ON SAID SHIPMENTS FOR REPARATION PURPOSES AND EARNINGS THEREUNDER, COMPARED WITH RATES PRESCRIBED AND/OR APPROVED AS REASONABLE ON SUGAR, BY THE INTERSTATE COMMERCE COMMISSION IN DECISIONS CITED, AND EARNINGS THEREUNDER.

UNITED STATES DISTRICT COURT
(ARIZONA)
CASE NO. E-763
EXHIBIT NO. F
SHEET NO. 1

LINE	FROM	TO	MILES	ROUTE	RATES ASSESSED: Ratee in cents per 100 pounds	RATES ASSESSED: Revenue Per Ton Mile (Mills)	RATES WHICH INTERSTATE COMMERCE COMMISSION DECLARES REASONABLE FOR REPARATION PURPOSES: Rate in cents per 100 lbs.	RATES WHICH INTERSTATE COMMERCE COMMISSION DECLARES REASONABLE FOR REPARATION PURPOSES: Revenue Per Ton Mile (Mills)
			Rates during period August 26,1920 to August 19, 1921					
1.	Crockett, Calif.	Bowie, Ariz.	1002 a	A	96½	19.2	93	18.5
2.	San Francisco, "	" "	1021 a	A	96½	18.9	93	18.2
3.	Spreckels, "	" "	970 a	C	96½	19.9	93	19.1
4.	Crockett, Calif.	Bowie, Ariz.	1068 b	C	96½	18.1	93	17.4
5.	San Francisco, "	" "	1083 b	C	96½	17.8	93	17.1
6.	Spreckels, "	" "	970 b	C	96½	19.9	93	19.1
			Rates during period August 20, 1921 to June 30, 1922.					
7.	Crockett, Calif.	Bowie, Ariz.	1002 a	A	96	19.1	93	18.5
8.	San Francisco, "	" "	1021 a	A	96	18.8	93	18.2
9.	Spreckels, "	" "	970 a	C	96	19.8	93	19.1
10.	Crockett, Calif.	Bowie, Ariz.	1068 b	C	96	18.0	93	17.4
11.	San Francisco, "	" "	1083 b	C	96	17.7	93	17.1
12.	Spreckels, "	" "	970 b	C	96	19.8	93	19.1
			Rates during period July 1, 1922 to January 10, 1924					
13.	Crockett, Calif.	Bowie, Ariz.	1002 a	A	86½	17.2	84	16.8
14.	San Francisco, "	" "	1021 a	A	86½	16.9	84	16.4
15.	Spreckels, "	" "	970 a	C	86½	17.8	84	17.3
16.	Crockett, Calif.	Bowie, Ariz.	1068 b	C	86½	16.2	84	15.7
17.	San Francisco, "	" "	1083 b	C	86½	16.0	84	15.5
18.	Spreckels, "	" "	970 b	C	86½	17.8	84	17.3

UNITED STATES DISTRICT COURT
(ARIZONA) CASE NO. L-763
EXHIBIT NO. F
SHEET NO. 2

- COMPARISONS -

LINE	FROM	TO	MILES	ROUTE	RATE IN CENTS PER 100 LBS.	REVENUE PER TON PER MILE (MILLS)	REMARKS
19.	Crockett, Calif.	Phoenix, Ariz.	768 a	B	96½	25.1	Rate prescribed in ICC 11532 (62 ICC 412) decided
20.	San Francisco, "	Phoenix, "	787 a	B	96½	24.5	June 22, 1921.
21.	Sprockels, "	" "	806 a	C	96½	23.9	do
22.	Crockett, Calif.	Phoenix, Ariz.	904 b	C	96½	21.3	do
23.	San Francisco, "	Phoenix, "	919 b	C	96½	21.0	do
24.	Sprockels, "	" "	806 b	C	96½	23.9	do
25.	Crockett, Calif.	Globe, Ariz.	1126 a	A	159 c	28.2	Rates in effect on January 18, 1922, and approved as
26.	San Francisco, "	" "	1145 a	A	159 c	27.7	reasonable in ICC 13139 (81 ICC 134), decided June 27,1923.
27.	Sprockels, "	" "	1094 a	C	159 c	29.0	do
28.	Crockett, Calif.	Globe, Ariz.	1192 b	C	159 c	26.6	do
29.	San Francisco, "	" "	1207 b	C	159 c	26.3	do
30.	Sprockels, "	" "	1094 b	C	159 c	29.0	do
31.	Crockett, Calif.	Safford, Ariz.	1042 a	A	129 c	24.8	do
32.	San Francisco, "	" "	1061 a	A	129 c	24.3	do
33.	Sprockels, "	" "	1010 a	C	129 c	25.5	do
34.	Crockett, Calif.	Safford, Ariz.	1108 b	C	129 c	23.3	do
35.	San Francisco, "	" "	1123 b	C	129 c	22.9	do
36.	Sprocklos, "	" "	1010 b	C	129 c	25.5	do
37	Crockett, Calif.	Douglas, Ariz.	1012 a	A	96½	19.0	Rates attacked as unreasonable in Docket 11442 (64 ICC
38	San Francisco, "	" "	1031 a	A	96½	18.7	405) decided November 3, 1921 and approved as reasonable
39	Sprockels, "	" "	980 a		96½	19.7	in said proceeding.
40	Crockett, Calif.	Douglas, Ariz.	1078 b	C	96½	17.9	do
41	San Francisco, "	" "	1093 b	C	96½	17.6	do
42	Sprockels, "	" "	980 b	C	96½	19.7	do

UNITED STATES DISTRICT COURT
(DISTRICT OF ARIZONA)
CASE NO. L-763
EXHIBIT NO. F
SHEET NO. 3

ROUTES:

A - Southern Pacific Company - Mojave, Calif. - A.T.&S.F.Ry. Phoenix, Ariz. - S.P.Co. via Maricopa, Ariz.

B - Southern Pacific Company - Mojave, Calif. - A.T.&S.F.Ry. Phoenix, Ariz.

C - Southern Pacific Company direct.

NOTES: a - Shortest direct rail mileages.

b - Mileage via usual and customary route of movement

c - Bowie, Ariz. combination, 96 cents to Bowie, plus 65 cents to Globe and 33 cents to Safford, Ariz.

Testimony of Mr. Solomon Fullerton

STATEMENT SHOWING RATES ASSESSED ON CARLOADS OF SUGAR FROM SOUTHERN CALIFORNIA POINTS VIZ: BETTERAVIA, OXNARD AND DYER, CALIF. TO BOWIE, ARIZ., AND EARNINGS THEREUNDER; RATES WHICH THE INTERSTATE COMMERCE COMMISSION DECLARED REASONABLE FOR REPARATION PURPOSES ON SAID SHIPMENTS, AND EARNINGS THEREUNDER, COMPARED WITH RATES PRESCRIBED AND/OR APPROVED AS REASONABLE ON SUGAR BY THE INTERSTATE COMMERCE COMMISSION IN DECISIONS CITED AND EARNINGS THEREUNDER.

UNITED STATES DISTRICT COURT
(ARIZONA)
Case No. L-763
Exhibit No. G
Sheet No.

LINE	FROM	TO	MILES	ROUTE	RATES ASSESSED: Rate in cents per 100 pounds	RATES ASSESSED: Revenue Per Ton Mile (Mills)	RATES WHICH INTERSTATE COMMERCE COMMISSION DECLARED REASONABLE FOR REPARATION PURPOSES: Rate in cents per 100 pounds	RATES WHICH INTERSTATE COMMERCE COMMISSION DECLARED REASONABLE FOR REPARATION PURPOSES: Revenue Per Ton Mile (Mills)
			Rates during period August 26, 1920 to August 19, 1921					
1.	Betteravia, Calif.	Bowie, Ariz.	816	C	96½	23.7	83	20.3
2.	Oxnard, "	" "	680	A	96½	28.3	83	24.4
3.	Dyer, "	" "	652	A	96½	29.6	83	25.7
			Rates during period August 20, 1921 to June 30, 1922					
4.	Betteravia, Calif.	Bowie, Ariz.	816	C	96	23.5	83	20.3
5.	Oxnard, "	" "	680	A	96	28.2	83	24.4
6.	Dyer, "	" "	652	A	96	29.4	83	25.7
			Rate during period July 1, 1922 to January 10, 1924.					
7.	Betteravi , Calif.	Bowie, Ariz.	816	C	86½	21.2	75	18.4
8.	Oxnard, "	" "	680	A	86½	25.4	75	22.1
9.	Dyer, "	" "	652	A	86½	26.5	75	23.0

- C O M P A R I S O N S -

LINES:	FROM	TO	MILES	ROUTE	Rate in cents per 100 lbs.	Revenue Per Ton Mile (Mills)	R E M A R K S
10	Betteravia, Calif.	Phoenix, Ariz.	652	D	96½	29.6	Rates prescribed in ICC 11532 (62 ICC 412)
11	Oxnard, "	" "	516	D	96½	37.4	decided June 22, 1921.
12	Dyer, "	" "	478	B	96½	40.4	do
13	Betteravia, Calif.	Globe, Ariz.	940	C	159 a	33.8	Rate in effect on Jan. 10, 1922, approved as
14	Oxnard, "	" "	804	A	159 a	39.6	reasonable in ICC 13139 (61 ICC 134) decided
15	Dyer, "	" "	776	A	159 a	41.0	June 27, 1923.
16	Betteravia, Calif.	Safford, Ariz.	856	C	129 a	30.1	do
17	Oxnard, "	" "	720	A	129 a	35.8	do
18	Dyer, "	" "	691	A	129 a	37.3	do
19	Betteravia, Calif.	Douglas, Ariz.	826	C	96½	23.4	Rate complained of as unreasonalbe in ICC Docket
20	Oxnard, "	" "	690	A	96½	28.0	11432 (64 ICC 405) and approved as reasonable by
21	Dyer, "	" "	662	A	96½	29.2	Interstate Commerce Commission decided Nov. 3,1921.

ROUTES: A - Southern Pacific Company. (a) - Bowie combination 96¢ to Bowie plus 63¢ to Globe and 33¢ to Safford, Ariz.
B - Southern Pacific Company via Maricopa, Arizona. C - Route D ... D - SAW RR - Guadalupe, Cal. - S.P.Co.via Maricopa.

(Testimony of J. L. Fielding.)

Thereupon the defendants offered in evidence, by reference, but without incorporating the same physically in the record, the reports of the Interstate Commerce Commission in Ex Parte 74, Increased Rates 1920, 58 I. C. C. 220, and Reduced Rates 1922, 68 I. C. C. 676; to which method of introduction plaintiff, through its counsel, agreed.

Thereupon it was stipulated and agreed, by and between counsel for plaintiff and defendants, that the Director-General of Railroads, as Agent of the President of the United States, acting pursuant to the Federal Control Act, assumed possession, control and operation of the railroad properties of defendants on or about December 29th, 1917, and in said capacity continued in such control, possession and operation until and including February 29th, 1920; that on March 1st, 1920, possession, control and operation of said railroad properties were resumed by defendants as the corporate owners.

Thereupon there was offered in evidence by defendants, through said Witness Fielding, and received as Exhibit "H", a true and correct copy of Freight Rate Authority No. 8016 of the Director General of Railroads. Said Exhibit "H" was and is in words and figures as follows: [169]

(Testimony of J. L. Fielding.)

EXHIBIT "H"

UNITED STATES RAILROAD ADMINISTRATION
Director General of Railroads
Division of Traffic—Western Territory
Transportation Building
608 South Dearborn Street
Room 1909
Chicago, Illinois
E. B. Boyd, Secretary
J. G. Morrison, Ass't. Secretary
Western Freight Traffic Committee

A. C. Johnson, Chairman, F. B. Houghton, S. H. Johnson, H. C. Barlow, Seth Mann, G. S. Maxwell.

Dockets Nos. 1990 & 2479 (F.R.A. 8016)

Chicago, Ill., May 27, 1919.

To the Chairmen, District Committees, and Freight Traffic Officers of Railroads under Federal Control, Western Territory.

RATE ADVICE NO. 3030

(Cancels Rate Advices Nos. 31 and 896)

CORRECTION OF CLERICAL OR TYPOGRAPHICAL ERRORS.

Freight Rate Authority No. 8016 dated May 16, 1919, has been issued by the Director of Traffic, reading as follows:

This will authorize publication of tariff changes to correct clerical or typographical errors under the following conditions:

(Testimony of J. L. Fielding.)

1. If in amending tariffs to comply with General Order No. 28, Circulars of the Division of Traffic, or under Freight Rate Authorities, issued by the Director, Division of Traffic, there was an error which resulted in establishing rates, charges, regulations or practices different from those prescribed in said Order, Circulars or Authorities, correction may be made to bring about compliance with said Order, Circulars or Authorities.

2. If after rates, charges, regulations or practices have once been correctly published under General Order No. 28, Circulars of the Division of Traffic, or a Freight Rate Authority, and in a subsequent reissue of supplements or tariffs there was an error which resulted in establishing rates, charges, regulations or practices different from those authorized in such Order, Circulars or Authorities, correction may be made to restore them to the basis as authorized.

Tariffs issued under this Freight Rate Authority shall show reference both to it and to the Order, Circular or Freight Rate Authority which authorized the rates, charges, regulations or practices as corrected.

Tariff changes made under this Freight Rate Authority may be made effective on one day's notice if they effect reductions; if they bring about advances they may also be made on one day's notice, provided they can be made effective on the same date as the item to be corrected, otherwise

(Testimony of J. L. Fielding.)

they must be made effective on thirty day's notice.

This cancels Freight Rate Authorities Nos. 154 and 2769.

Please be governed accordingly.

A. C. JOHNSON,
Chairman. [170]

A-HJL

Thereupon there was offered in evidence by defendants through Witness Fielding, and received as Exhibit "I", a true and correct copy of an original letter from W. G. Barnwell, Chairman of the San Francisco District Freight Traffic Committee of the United States Railroad Administration, dated at San Francisco, California, August 15, 1919, and relating to the application of the provisions of General Order No. 28 of the Director-General of Railroads to rates on sugar to points in Arizona, including Bowie. Said Exhibit "I" was and is in words and figures as follows [171]

(Testimony of J. L. Fielding.)

EXHIBIT "I"

UNITED STATES RAILROAD ADMINISTRATION

J. T. S. Aug. 16, 1919

Director General of Railroads
Division of Traffic—Western Territory
64 Pine Street
Room 404
San Francisco, Cal.

San Francisco District Freight Traffic Committee
W. G. Barnwell, Chairman, G. W. Luce, H. K. Faye, S. H. Love, F. P. Gregson, John S. Willis.
F. W. Gomph, Secretary

August 15, 1919.
File No. RA 2068-A-4

SUBJECT: Increase in the Rate on Sugar, carloads, from California Points to Albuquerque, New Mexico, and El Paso, Texas.

Mr. T. A. Graham, A.F.T.M., Southern Pacific R.R., San Francisco, Cal.

Mr. W. G. Barnwell, A.F.T.M., A. T. & S. F. R. R., San Francisco, Cal.

Mr. H. K. Faye, G.F.A., Western Pacific R. R., San Francisco, Cal.

Mr. T. M. Sloan, F. G. A., L. A. & S. L. R. R., Los Angeles, Cal.

Gentlemen:

Referring to Mr. Graham's letter of July 18th, file 1—N—6053-B-Cal-NM, relative to the proper increase to be made in the rates on Sugar, carloads,

(Testimony of J. L. Fielding.)

from California points to points in Arizona, New Mexico, Nevada and Utah, by authority of that portion of General Order 28 which reads: "from points in California and Oregon to points taking Missouri River rates and points related thereto, under the Commission's Fourth Section order, increased 22 cents per 100 pounds". In order to determine just what was meant by the words "and points related thereto under the Commission's Fourth Section order" the Committee wired Director Chambers, who replied on August 12th as follows:

"In Item 6 of Sugar paragraph in General Order 28 our reference to Commission's Fourth Section orders had in mind the fact that in the Commission's Fourth Section orders covering Eastbound Sugar to Missouri River the Commission prescribed that via certain routes the Missouri River or Colorado rates should be held as maximum while via other routes they prescribed that the rates might be ten cents less than to the Missouri River and it was to those points which were held down by the Missouri River rate under these Fourth Section orders that item 6 prescribes a 22 cent increase. Note item 6 also provides for 22 cent increase to points taking Missouri River rates so if the rates to the destinations in question were prior to June 25th either the same as the Missouri River rates or held down by the Commission's order in the Missouri River case like the 10 cent higher basis then the advance should be 22 cents, otherwise 25%." [172]

(Testimony of J. L. Fielding.)

#2—Joint letter to Messrs. Graham, Barnwell, Faye and Sloan—RA 2068-A-4.

It would appear, therefore, that where rates to points west of the western boundary line of Group J territory published in tariffs of individual line or Bureau issue are the same as the rate to Colorado or Missouri River by reason of the application of those rates as maximum at intermediate points, such rates should be increased 22 cents per 100 lbs.

Further, that *were* rates to branch line points or to points on connecting lines are made by using said maximum rates to the junction, plus locals or arbitraries beyond the junction, those rates should be increased on the basis of 22 cents per 100 lbs. to the junction point and the local or arbitraries beyond the junction point, increased 25%, should be added thereto.

Attention is directed to the rates published in Agent Gomph's Tariff No. 23 Series to points on the Oregon Short Line north of Ogden, Utah, where rates may have been constructed on an arbitrary basis without regard to the rate to Ogden but with regard to the rates from Missouri River to O.S.L. points. A check should be made of those rates and if it is found that any of them are constructed on such an arbitrary basis they should be increased 25%. Interested carriers are requested to look into this feature of that tariff and arrange to give Agent Gomph specific instructions as to the changes that should be made in those rates.

(Testimony of J. L. Fielding.)

Where rates have been published on basis of a 25% increase but which should have been increased 22 cents per 100 lbs., Freight Rate Authority No. 8016 of May 16th issued for the purpose of permitting corrections in clerical errors is sufficient authority to proceed. No additional Freight Rate Authority is necessary to cover the reissuance of rates which have not already been transposed to the General Order 28 basis.

Yours truly,

W. G. BARNWELL.

CC to Messrs.:

W. C. Barnes
E. J. Fenchurch
J. A. Reeves
Fred Wild, Jr.
F. W. Gomph [173]

Thereupon Witness Fielding testified further as follows:

"In my experience as a rate expert the judgment of the Commission, when it has prescribed a rate between two points, is always considered as a fair measure of the proper rate for a similar transportation service between two other related points in the same territory. We generally agree with the Commission as to rates for the future, and accept its affirmative action as a guide to our action in fixing rates between points related to those between which the Commission has prescribed the rates.

(Testimony of J. L. Fielding.)

There is no guide or index of rate-making upon which we would prefer to rely. If there had been, during 1921 to 1923, a rate prescribed by the Commission from the same points of origin to a destination in Arizona related to Bowie, we would have taken that rate as some measure of a reasonable rate to Bowie at that time. During the period of movement of the plaintiff's shipments there were in effect to Phoenix rates of 96 cents, or less, in conformity with the order in the First Phoenix Case, in which a maximum rate of 96½ cents from California points to Phoenix was prescribed. In view of that fact, I can not justify the retroactive application of rates of 75 cents and 84 cents from the same points of origin to Bowie, upon the plaintiff's shipments. The distance from California points to Bowie at the time these shipments moved was about 164 miles greater than to Phoenix; and a reasonable rate to Bowie should be greater than the corresponding rate to Phoenix. Shipments from northern California points would move over the Southern Pacific direct via Los Angeles to Maricopa, and thence over the Arizona Eastern, a solely controlled subsidiary of the Southern Pacific, to Phoenix, during 1921, 1922, and 1923; and shipments to Bowie would move direct over the Southern Pacific main line, following the same route as far as Maricopa. This situation was true at all times during which the plaintiff's shipments here involved were moving."

(Testimony of J. L. Fielding.)

Cross Examination: [174]

"During the period of movement of the shipments here involved Phoenix was not intermediate to Bowie, because Phoenix was on a branch line reached via Maricopa, whereas Bowie was on the main line. The movement to Phoenix involved a haul over the Arizona Eastern, a Southern Pacific subsidiary, and was thus referred to by the carriers as a two-line haul. Arbitraries in the rates were added by the carriers, and prescribed by the Commission, for this two-line haul. The conditions at Bowie differed from those at Phoenix, because Bowie was on the Southern Pacific main line."

"We accept the Interstate Commerce Commission's rulings as to groupings and related points, generally, provided that the Commission's findings in a particular case have been settled. A great many commodities have had rates blanketed all the way across the State of Arizona, regardless of mileage, and a great many of those rates today bear the Commission's approval. Rates on sugar were blanketed all the way across to Trinidad, Colorado, and mileage did not enter into consideration in the fixing of the rates; this was because of the desire of the California carriers to handle the California production into the competitive markets east of Colorado, for which purpose they made comparatively low rates, applying the same rates to the relatively light movement to Arizona points. The result was that the rates were the same to intermediate points all along the line, including intermediate points in New Mex-

(Testimony of J. L. Fielding.)

ico. Sugar going to Safford and Globe, Arizona, had to move through Bowie as a junction point, and via the Arizona Eastern, and so moved during 1921 to 1923, the period here involved.

While lower rates were in effect to Trinidad, Colorado, and points east, prior to 1924, than to Bowie, and the mileage, volume of movement, and all other conditions, to Trinidad were therefore ignored in making the rates, this was with the Commission's permission, and by its authority. This authority to depart from the Fourth Section was withdrawn in 1924, subsequent to the period of [175] movement involved here."

The question was then asked the witness on cross examination by plaintiff's counsel whether, assuming that the Commission had not rendered its decision in the First Phoenix Case, he would say that the rates to Bowie prescribed for reparation purposes were reasonable; to which question defendants objected upon the ground that the same was incompetent, in that it assumed the existence of facts not in evidence, and known to be contrary to the undisputed evidence. Said objection was overruled by the Court, to which ruling defendants then and there duly excepted.

Witness Fielding thereupon testified further as follows:

"I cannot answer that question, because it would be silly for me to say that those rates were reasonable for the past when they had not been approved for the past.

(Testimony of J. L. Fielding.)

As far as reparation is concerned, the rates in effect at the time the shipments moved were reasonable. Rates are always assumed to be reasonable until found otherwise.

It is not a fact that I have advanced the theory that the correct rate to Arizona would be 120 per cent of the Memphis-Southwestern rate for the same distance. All that I have done or that anyone in our company has done is to attempt to persuade the Commission, upon the basis of operating and transportation conditions, that the rates in this territory should be 30 per cent to 40 per cent higher than in the Southwest. I have never subscribed to any fixed rate-relationship in this territory as compared to the Southwest."

The witness was then questioned by plaintiff's counsel as to the relationship between the class rates, as between this territory and Southwestern territory; to which question defendants then and there objected, upon the ground that the same was immaterial and incompetent, and improper cross examination. Said objection was overruled by the Court, to which ruling defendants then and there [176] duly excepted.

Witness Fielding thereupon testified further as follows:

"There is no relationship as to the class rates; although the class rates fixed by the Commission between Arizona and California range in some cases as much as 40 per cent higher than in Southwestern territory, and are generally higher. My opinion as

(Testimony of J. L. Fielding.)

to what was a reasonable rate to Bowie was based solely upon the rate that was in effect to Phoenix."

Re-direct Examination:

"My previous answer as to the reasonableness of the rates to Bowie was based largely upon the prescribed rate to Phoenix, fixed in the First Phoenix Case. If the 96½-cent rate thus prescribed to Phoenix was reasonable, certainly any lower rate to Bowie, a point 167 miles farther, would be condemned by anybody as being unduly low.

While Phoenix in 1921 was on a branch line, or a line of a Southern Pacific subsidiary, the rates on sugar to Phoenix, ever since 1920, have uniformly been on the main-line basis, the same as to Maricopa; and no differential has been made since that time because of the branch-line haul.

While the rates to Bowie were the same as to points farther east, including some points in New Mexico, those rates were held down by the existence of extremely low competitive rates to the consuming territory east of New Mexico. The reason for the existence of rates to Bowie, on the same level as to points farther east, was the desire of California carriers to carry sugar, at whatever rates they could get, in competition with eastern lines reaching the same destinations in the heavy consuming territory. This is shown in the Commission's decisions in the earlier sugar cases."

Re-cross Examination:

"There are no circumstances under which one

(Testimony of J. L. Fielding.)

would be justified [177] in charging a lower rate for the farther distance to Bowie than the corresponding rate to Phoenix. Where this was done prior to the First Phoenix Case (1921), it was because of the addition of the arbitrary for the two-line haul to Phoenix. I do not know of any specific situation today where we charge a lower rate to a more distant point on a main line than to a less distant point on a branch line, though such a situation may be possible. We do have branch-line arbitraries at the present time, and at one time charged arbitraries to Phoenix.

The rates shown for purposes of comparison on my Exhibit 'F' are the rates in effect prior to July 1, 1922; those rates, particularly to Phoenix, were found reasonable by the Commission. The rate to Phoenix was reduced 10 per cent in 1922, and after that date was 86½ cents. The same is true as to the rates to Douglas. This is not shown on my exhibit."

Re-direct Examination:

"The purpose of my Exhibit 'F', as stated in its title, is to compare the rates to Bowie with rates which the Commission found reasonable."

Thereupon defendants moved the Court to render and enter judgment upon the pleadings, and the evidence, in favor of the defendants and against the plaintiff, dismissing the complaint; which motion was denied by the Court, to which ruling denying their said motion defendants then and there duly excepted.

[Testimony of J. L. Fielding.]

The parties had theretofore requested the Court, by oral request duly made in open court, to make, enter and file special findings of fact and conclusions of law, prior to rendering and entering judgment. Thereupon the parties rested, and no further evidence was offered or received on that day.

Thereafter and on November 9, 1932, the cause was orally argued by counsel for the respective parties, and submitted to the Court for decision, subject to further hearing upon the question [178] of the fees to be allowed to plaintiff's attorneys and counsel in the event plaintiff should finally prevail. Thereafter, and on December 27, 1932, the Court announced that he was of opinion that after the final submission of the cause, plaintiff would be entitled to recover.

Thereafter and on January 17, 1933, and pursuant to stipulation and agreement of the parties, each of said parties introduced testimony respecting the amount of the attorneys' fees to be allowed by the Court to plaintiff's attorneys. To support its contentions as to said attorneys' fees, plaintiff offered the following testimony, to wit:

(It was agreed by and between plaintiff and defendants that, it appearing that Samuel White, Esquire, one of plaintiff's counsel, was unable to be present, he would, if present and sworn as a witness, testify substantially as appears in the following statement.)

STATEMENT OF SAMUEL WHITE:

"I have been a practicing attorney for fifty-one years, with experience before the courts of Arizona and Oregon and various federal courts, including the United States Supreme Court. In my practice I have had considerable experience in connection with cases based upon reparation orders of the Interstate Commerce Commission. In the instant case and other cases of the same kind now being discussed I have expended a great deal of time, effort and energy in preparation, including preparation of the complaints, research of the law, preparation of briefs and argument, and preparation for trial. In these cases I have collaborated with Mr. Snell. The handling and prosecution of these cases involves a great deal more effort and professional ability than would be required in an action upon a promissory note or the foreclosure of a mortgage.

After considering the amount involved in the case and the character of the services rendered, it is my opinion that a reasonable fee for the services rendered in connection with this case [179] before the District Court is 25 per cent of the total amount involved; that is to say, 25 per cent of the principal, plus interest, due to date."

TESTIMONY OF FRANK L. SNELL, JR.

Direct Examination.

"My name is Frank L. Snell, Jr. I am a practicing attorney, and a graduate of the Kansas Uni-

(Testimony of Frank L. Snell, Jr.)

versity Law School. (Mr. Snell's qualifications were then admitted by defendants). My practice has been before the Superior Courts of Arizona, and the courts of New Mexico and Missouri, and before various federal courts, including the Supreme Court of the United States. I have had experience in the preparation, handling and disposition of reparation cases such as the present case, which experience goes back over the past four years. Particular and special knowledge is essential in cases of this kind, which I consider to be in the nature of a special class of legal work. I have made a special study of these cases, and of the law involved. I have been associated with Judge White in the instant case. Among the services rendered in connection with this particular case were the following: preparation of the complaint; an attempt to reach an agreed statement of facts, which was, however, unsuccessful; and the actual preparation for trial, including consultation with Witness Reif, and the preparation of exhibits and other evidence. It was also necessary to anticipate the defendants' evidence, and therefore to prepare a rather full and comprehensive trial brief, all of which was done in collaboration with Judge White. The next was the trial of the case, following which there was oral argument, and the preparation of a brief which I submitted. There has also been the necessary preparation for this hearing on attorneys' fees, which will be followed, I presume, by preparation of findings of fact, conclusions of law and the judgment. In the instant case, the total

(Testimony of Frank L. Snell, Jr.)

amount involved, as computed by Judge White, being principal, plus interest to January 16, 1933, is $3,081.17. [180]

In my opinion a fee of 25 per cent of the total amount involved would be a reasonable fee. I base that opinion upon consideration of all the work necessary in this case and the companion reparation cases now being considered, and considering also the time expended, which amounted to 182 office hours and 30 court hours, not including Judge White's time. I have checked this figure, by computing our office time on the basis of $15.00 per hour and our time in court at $200.00 per day."

Cross Examination.

"I justify $15.00 per hour for office work on the basis of charges made to insurance companies and companies which are pretty careful about their fees and it has always been accepted. It is the regular charge of our office. The regular charge of our office for a day in court is $200.00. We are paid at the rate of $15.00 per hour for office work in other transactions not involving trial work. That is not an arbitrary charge, for some cases justify larger and some cases smaller charges. The preparation in this case was not as difficult as the original preparation in the Arizona Grocery Case, but one has to be very careful to be sure that the complaint agrees with the Commission's order. It is not a matter that can be treated with indifference. You do not have to pay any more attention to detail in a case of this kind than in the case of a mort-

(Testimony of Frank L. Snell, Jr.)
gage foreclosure. I acquired considerable knowledge of the Interstate Commerce Act in the Arizona Grocery Case, but I spent a great deal more time in that case than in the present case upon the preparation.

In cases of this character $200.00 for each court day would be the minimum fee. I do not know about any other firm's collections, though other firms do charge that for their work. In public liability cases, with considerable amounts involved, where we are successful, $200.00 per day is the minimum charge. The charge of $15.00 per hour for office work is based upon the study made in [181] our own office some years ago. I have made a study of the matter among the attorneys here in Phoenix, and found that various amounts were being charged, depending upon the men doing the work.

I do not believe there is any office, and ours is no exception, that works arbitrarily on an hourly basis. I have used that basis in checking the fee in this case and found that it approximated the 25 per-cent fee which I consider to be fair. In our insurance company practice the clients have accepted the basis above outlined, although in the trial of cases we are upon a per diem basis and the amount paid depends on the case. We have not accepted compensation from the insurance companies on the basis of $100.00 retainer, and $100.00 per day fee.

My figure of $15.00 per hour for office work approximates $100.00 per day, although the actual

(Testimony of Frank L. Snell, Jr.)

work in the office will not exceed five or six hours. On that basis, the average charge for each day's work figures about $75.00, or possibly less."

Thereupon plaintiff rested.

Thereupon defendants offered testimony with respect to plaintiff's said attorneys' fees as follows:

TESTIMONY OF BURTON MASON:

Direct Examination:

"My name is Burton Mason; and I am Commerce Attorney for the Southern Pacific Company. I have had 10½ years' experience in commerce work. I am admitted to practice in California and in the various federal courts, including the Supreme Court. I am also admitted to practice before the Interstate Commerce Commission, the Board of Tax Appeals, and the Treasury Department. I have had varied experience as a commerce attorney, in the handling of rate and traffic matters, and reparation cases. I have appeared on behalf of shippers, prior to my connection with the Southern Pacific, and during the last 6½ years as a representative of the carriers. In my experience I have become acquainted with the fees charged and allowed [182] for services of counsel in reparation cases, from the standpoint of the shippers as well as of the defendant carriers.

I have made a study of various cases in which reparation was involved, including cases in which

[Testimony of Burton Mason.]

I have myself participated. In the Meeker Case, which went to the Supreme Court, the total amount of the judgment was $109,000, and the fee allowed in the District Court, as corrected by the Supreme Court, was $7,500.00, or less than 7½ per cent of the total. In the Feintuch Case, 191 Fed. 482, which was also a reparation case, total judgment was $464.55, a comparatively small amount; and an attorney's fee of $150.00, or about one-third, was allowed. In the Ingalls Case, 51 Fed. (2d) 310 the recovery was $196.29. Although the prosecution of the case involved considerable labor, as will be seen from the fact there were two prior decisions, the fee allowed was $75.00. This fee took into consideration the amount involved. In the Lewis-Simas-Jones Case, finally decided by the Supreme Court, 283 U. S. 654, the amount finally paid on account of the reparation award was $1,700. This case was tried in the State Court of San Francisco, afterwards appealed to the District Court of Appeal of California, and then submitted to the Supreme Court of California on petition for hearing by that court after decision by the appellate court. It was also heard by the United States Supreme Court on writ of certiorari, where it was briefed and orally argued. The attorney's fee was fixed by arbitration, at $1,725.00 to cover all the work in all four courts. If one-third of this fee was allowed for the work in the trial court, it would approximate $575.00, or about 33 per cent. In the World Publishing Company Case, reported 16 Fed. (2d) 130, the total

[Testimony of Burton Mason.]

judgment was approximately $9,000.00, and the fee allowed was $2,500.00, covering the work in the trial court and in the Circuit Court of Appeals. In the Montrose Case, 25 Fed. (2d) 750, the total amount of the judgment, plus interest, was $80,000, and the attorney's fee allowed was $7,500.00, or about 10 per cent. In the Baer [183] Bros. Case, 200 Fed. 614, the amount of reparation, not including interest, was $723.00, and the attorney's fee was $250.00, which was considerably less than 25 per cent of the total recovery including interest. In the Consolidated Cut Stone Case, 39 Fed. (2d) 661, the total of the judgment was $30,624.00. The total fee of plaintiff's attorney, covering proceedings in the District Court, the Circuit Court of Appeals, and on petition for certiorari to the Supreme Court, was $7,500.00. If that case were taken as an index in the present case, it would indicate a fee of not more than 15 per cent of the total recovery. In the Sloss-Sheffield Case, finally decided about 1928, 269 U. S. 217, the total judgment including interest was in excess of $300,000.00. The case was vigorously fought. The attorney's fee allowed was $15,000.00, or almost exactly 5 per cent. In the Mills Case, 226 Fed. 812, the amount of the recovery was in excess of $9,000.00. There was a trial before a jury and afterwards proceedings were had in the Circuit Court of Appeals and in the Supreme Court. An attorney's fee of $1,000.00 was allowed for the services in the trial court and the same amount for services in the Court of Appeals. The fee for the work in the trial court was thus

[Testimony of Burton Mason.]
about 11 per cent of the amount recovered. In the Minds Case, 237 Fed. 267, the total amount recovered was $49,711.00, and the fee allowed was $10,000, which covered all of the work in the trial court and upon appeal to the Circuit Court of Appeals and the Supreme Court of the United States. In the Standard Oil Case, recently decided, the amount of reparation, exclusive of interest, was $380,000.00, and the amount of the judgment, exclusive of attorneys' fees and costs, was $530,000.00. The case was settled by paying the principal amount, exclusive of interest, or $380,000.00, plus $20,000.00 to cover attorneys' fees, costs and other expenses, or a little more than 5 per cent. I participated actively in that case.

In my opinion a reasonable fee in this case would be 10 per [184] cent of the amount recovered. While collections may pay 20 per cent, those are small collections, whereas this case and the other similar cases now being considered are not small cases, the total amount involved being about $26,000.00. While this has taken several suits, they have all been consolidated and practically tried as one. All that was required was the preparation of a simple form of complaint in each case, the form being varied only as to names of plaintiffs and destinations, and amounts. The essential allegations are identical. While 10 per cent might be comparatively inadequate in one of the smaller cases, it would be more than enough in one of the other cases where the work has been the same but the amount of the recovery happens to be greater.

[Testimony of Burton Mason.]

In the Union Oil Company and Shell Oil Company Cases, in which I participated, plaintiffs obtained judgments after lengthy proceedings, including a trial and oral argument. The judgments, including interest on the reparation awards amounted to $173,000.00. The trial court in those cases, after hearing on the question of counsel fees, awarded a fee of 10 per cent of the total recovery. That money was never actually paid because the cases were settled by paying the principal sums of reparation, without interest, but with a fee of $15,000.00 to cover all services.

In this case and in the other cases of similar character here being considered, Mr. Snell has pointed to a total of 182 office hours and 30 court hours, and proposes that his total compensation for this work should be $3,762.00. The annual salary of a United States District Judge is $10,000, less whatever income tax may be assessed. In the Train Limit Cases, with which I am somewhat familiar, the Master has done far more than three times the amount of work claimed to have been done by Mr. Snell and has received a fee of $11,000.00. On the basis of the Master's compensation, Mr. Snell's fee in all of these cases should be about $1,500.00, or about 10 per cent. If we suppose that the Court sits 250 working days [185] a year, the Judge's compensation is equal to $40.00 per day; and yet plaintiff's counsel claims $100.00 for office work and $200.00 a day for court work. It is probable that all judges of the District Courts are underpaid,

particularly the judges who have to listen to reparation suits."

Defendants thereupon rested, and the testimony was closed.

Thereupon the Court stated that in his opinion a fee of about 20 per cent of the total amount involved would be a reasonable attorney's fee; and did then and there render and enter an order allowing to plaintiff's attorneys 20 per cent of the total amount recovered as the fee to be paid the plaintiff's attorneys and counsel, when and if judgment should be rendered for the plaintiff. To the Court's said order, finding and ruling defendants then and there in open court duly excepted. Thereupon the Court ordered special findings of fact and conclusions of law to be proposed, and withheld judgment until said findings and conclusions should be settled.

Thereafter, the plaintiff did file its written proposed special findings of fact and conclusions of law; and defendants filed written proposed amendments and additions to the findings of fact and conclusions proposed and requested by plaintiff; and defendants further filed written special findings of fact and conclusions of law proposed and requested by them.

Thereafter, and on the 12th day of May, 1933, the Court did in open court hear argument upon such proposed findings and conclusions, and the amendments and additions to plaintiff's requested findings of fact and conclusions of law, as proposed by

defendants: and defendants did then and there, by their counsel, duly request the Court by written instrument, and also orally in open court, to make the following findings of fact, to wit (Paragraphs are numbered according to the written Special Findings of Fact requested by defendants, and on file in this cause): [186]

6. Thereafter, pursuant to said report, and in accordance with Rule V of the Rules of Practice of said Commission, plaintiff prepared the aforesaid Rule V statement showing the shipments upon which reparation was claimed, a copy of which is attached to the complaint herein, as Exhibit "B", as heretofore set forth.

7. Thereafter, under date of April 14, 1930, said Commission made and entered its order directing and requiring said defendants to pay to the plaintiff, on or before May 31, 1930, as reparation and damages, the amounts set opposite their respective names in said order, with interest thereon at the rate of six (6) percent per annum from the respective dates of the payment of charges as shown in said Rule V statements. A copy of said reparation order is annexed as Exhibit "C" to the complaint on file herein, and is hereby referred to for further particulars.

9. Under date of May 25, 1915, in response to a complaint attacking as unreasonable the

rates on sugar in carloads from all points in California to all destinations in Arizona (including Bowie) said Commission, after full hearing and investigation, rendered its report and order in a proceeding known and entitled as Docket No. 6806, Ariz. Corp. Comm. v. A. T. & S. F. Ry. Co., et al., 34 I. C. C. 158. Reference is hereby made to said report of said Commission, as set forth in its official reports, for further particulars.

As more fully appears from said report, the complaint in said Docket No. 6806 was filed with the Commission on April 15, 1914. During the pendency of said proceeding the carriers named as defendants therein voluntarily reduced their rates on sugar from all points of origin in [187] California to substantially all destinations in Arizona, including Bowie. Such voluntary reductions included in particular the establishment of rates on sugar, in carloads, from all said points in California to all said destinations in Arizona, subject to a minimum weight of 60,000 pounds per car, which rates were in all cases less than the rates theretofore applying from and to the same points in connection with a carload minimum weight of 36,000 pounds. In and by its said report in said Docket No. 6806 said Commission duly found, among other things, that said rates on sugar to Bowie, as voluntarily reduced during the pendency of said proceeding, were and in future would be just and reasonable. No order respect-

defendants; and defendants did then and there, by their counsel, duly request the Court by written instrument, and also orally in open court, to make the following findings of fact, to wit (Paragraphs are numbered according to the written Special Findings of Fact requested by defendants, and on file in this cause): [186]

6. Thereafter, pursuant to said report, and in accordance with Rule V of the Rules of Practice of said Commission, plaintiff prepared the aforesaid Rule V statement showing the shipments upon which reparation was claimed, a copy of which is attached to the complaint herein, as Exhibit "B", as heretofore set forth.

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ing said rates to Bowie was made by said Commission in said proceeding.

The character and extent of said voluntary reductions, and in particular of the reductions in the rates to Bowie, is fully set forth in said report in said Docket No. 6806.

10. In compliance with the Commission's said findings in said Docket No. 6806, the carriers parties to the rates therein involved continued until and including December 29, 1917, the rates on sugar in carloads, from the several points in California to the destinations in Arizona involved in this cause, which were in effect on said May 25, 1915. Upon said December 29, 1917, possession, control and operation of the railroad properties of the defendants and generally of all other railroad common carriers throughout the United States were assumed by the Director-General of Railroads, as Agent of the President of the United States, and said Director-General continued in such possession, control and operation until and including February 29, 1920. Said rates heretofore last-mentioned were continued in [188] effect by said Director-General from and after said December 29, 1917, until, but not including, June 25, 1918. On June 25, 1918, said Director-General caused said rates to be increased as specified and provided in General Order No. 28, issued by said Director-General pursuant to authority conferred by the Federal Control Act, 40 Stat. L. 456. Upon November 25, 1919, said rates, as

modified by the changes made pursuant to said General Order No. 28, were further modified pursuant to and as provided by an order duly issued by said Director-General, styled "Freight Rate Authority No. 8016, dated May 16, 1919". Said order last mentioned, also issued pursuant to authority duly conferred by said Federal Control Act, brought about a general readjustment of rates on sugar throughout the western part of the United States. On February 29, 1920, said Director-General, by order duly made, further modified said rates heretofore mentioned by canceling the rates from said California points to Bowie, then and theretofore in effect, subject to a carload minimum weight of 36,000 pounds. The rates then and theretofore in effect from and to said points, subject to a carload minimum weight of 60,000 pounds, was continued without further modification until, but not including, August 26, 1920.

11. On March 1st, 1920, upon the termination of Federal control, the several defendants and other carriers resumed possession and control of their railroad properties. Said carriers, parties to the rates on sugar from said California points to Bowie, maintained from and after said last mentioned date until, but not including, August 26, 1920, said rate on sugar subject to a carload minimum weight of 60,000 pounds which was in effect from and to said points at the date of termination of Federal control. On [189] said date last mentioned said rate was increased to

96½ cents per hundred pounds, as authorized by the report and order of said Commission in the proceeding entitled Ex Parte 74, Increased Rates 1920, 58 I. C. C. 220, to which report reference is hereby made for further particulars. Said report and order authorized general percentage advances in interstate freight rates throughout the United States.

12. Said rate of 96½ cents, as made effective August 26, 1920, was voluntarily reduced by said defendants, effective July 27, 1921, to 96 cents; and was further voluntarily reduced by said defendants, effective July 1st, 1922, to 86½ cents. Said reduction last-mentioned was in conformity with the recommendations made by said Commission in its report in a proceeding entitled: Reduced Rates 1922, 68 I. C. C. 676, to which report reference is hereby made for further particulars. Said rate of 86½ cents last-mentioned was further voluntarily reduced by said defendants, on or about January 11, 1924, to 84 cents. Said rates of 96½ cents, 96 cents, and 86½ cents, which were successively in effect during the period August 26, 1920, to January 10, 1924, both inclusive, were the rates assessed upon plaintiff's shipments during the period of movement thereof, as shown upon said Rule V statement annexed to the complaint herein, and are the rates referred to "As Charged" upon said statement.

13. On or about the 22nd day of June, 1921, and after full hearing and investigation, said

Commission rendered its report and order in a proceeding entitled Docket No. 11532, Traffic Bureau, Phoenix Chamber of Commerce, et al. v. Director-General, et al., 62 I. C. C. 412 (to which report reference is hereby made for further particulars) wherein [190] and whereby said Commission found, among other things, that the reasonable rate thereafter to be applied to the transportation of sugar in carloads, minimum weight 60,000 pounds, from points of origin in California (including the points of origin of the plaintiff's shipments involved herein) to Phoenix, Arizona, should not exceed 96½ cents per hundred pounds. The usual and customary routes of movement from said points of origin in California to Phoenix, Arizona, were at all times prior to November 1, 1926, identical with the direct routes of movement of shipments from said points to Bowie, Arizona, as far as and including Maricopa, Arizona, a point 35 miles by rail from Phoenix; and the distances over said routes of movement from said points of origin in California to Phoenix were at all times during the period of movement of the plaintiff's shipments involved herein, 160 miles less than the corresponding distances from said points of origin to Bowie. Said order of said Commission in said proceeding last mentioned, Docket No. 11532, specified that said rate of 96½ cents should be observed as the reasonable maximum rate from California points to Phoenix until the further order of said Com-

mission; and no further order with respect to said rate was made by said Commission during the period of movement of the plaintiff's shipments, or until about February 25, 1925. During all of said period of movement, said rate of 96½ cents was, and continued to be, the duly established and conclusive measure of the just and reasonable rate on sugar from the points of origin in California involved herein to Phoenix, and related points in Arizona, including Bowie.

14. On November 3, 1921, and after full hearing, said [191] Commission rendered its report and order in a proceeding entitled Docket No. 11442, Traffic Bureau, Douglas Chamber of Commerce & Mines v. A. T. & S. F. Ry. Co., et al., 64 I. C. C. 405 (to which report of said Commission reference is hereby made for further particulars), in response to a complaint alleging, among other things, that the rates on sugar, in carloads, from points in California, including all of the points of origin of the plaintiff's shipments, to Douglas, Arizona, were and in future would be unreasonable and otherwise in violation of the Interstate Commerce Act. In said report said Commission found that said rate, which at the date of said complaint was 96½ cents per hundred pounds, was and in future would be not unreasonable. No further findings or order with respect to said rate to Douglas were made by said Commission subsequent to the report in said Docket No.

11442, until March 12, 1928, the date of the findings and order in said Docket No. 16742, and associated cases, to which reference has heretofore been made. The direct and actual routes of movement of plaintiff's shipments from points of origin in California to Bowie, Arizona, during all of the period of the movement thereof, were identical with the direct routes over which shipments of sugar moved from said points of origin to Douglas, Arizona, as far as and including Tucson, Arizona, a point about 124 miles westerly from Douglas and about 115 miles westerly from Bowie; and the distances from said points of origin in California to Douglas, Arizona, were, during all of said times, less than 10 miles greater than the corresponding distances from said points of origin to Bowie. During all of the period of movement of the plaintiff's shipments, said rate of 96½ cents to Douglas, found reasonable by said Commission in its report [192] in said Docket No. 11442, was and continued to be the duly established and conclusive measure of a just and reasonable rate for the transportation of shipments of sugar from the points of origin of plaintiff's shipments to Douglas and related points in Arizona, including Bowie in particular.

15. On June 27, 1923, after full hearing, and in response to a complaint alleging among other things that the rates on sugar in carloads from points in California including the points

of origin of plaintiff's shipments, to destinations in Arizona on the Globe Division of the Arizona Eastern Railroad Company (now the Globe Branch of the Southern Pacific Company) were unreasonable and otherwise in violation of the Interstate Commerce Act, said Commission rendered its report and order in a proceeding entitled Docket No. 13139: Graham & Gila Counties Traffic Assn. v. A. E. R. Co., et al., 81 I. C. C. 134. In said report said Commission found and declared that said rates, as in effect on January 18, 1922, were and in future would be not unreasonable. Reference is hereby made to said report for further particulars. On said date, January 18, 1922, the rate on shipments of sugar in carloads from the points of origin of the plaintiff's shipments to Globe, Arizona, was $1.59 per hundred pounds; the corresponding rate on sugar from said points of origin to Safford, Ariz., was $1.29; both said points, Globe and Safford, being located upon said Globe Division heretofore referred to. The direct routes from the points of origin of the plaintiff's shipments to Globe and Safford, were, at all times involved in this cause, identical with the direct routes from said points of origin to Bowie, as far as and including Bowie itself; Bowie being the point of junction [193] of said Globe Division with the main line of the Southern Pacific extending from Tucson, Arizona, via Bowie, to El Paso, Texas. At all said times the distances

from said points of origin to Globe and Safford were, respectively, 124 miles, and 40 miles, greater than to Bowie. During all said times said rates of $1.59 to Globe and $1.29 to Safford were, and continued to be, duly established and conclusive measures of the transportation services to which they respectively applied, and of similar transportation services over the same lines to related destinations.

16. The rates and charges assessed and collected upon the plaintiff's said shipments, as set forth upon said Rule V statement annexed to the complaint, were, and each of them was, just and reasonable, and in full conformity with the Interstate Commerce Act, and were, and each of them was, lawfully applied, assessed and collected by the said defendants.

which requests were severally denied by the Court, and the Court refused to find such facts as so requested; and defendants, by their counsel, then and there duly excepted to each and all of said rulings of the Court in failing to find such facts as so requested by them.

Defendants further did then and there, by their counsel, request the Court by written instrument and also orally in open court, to make the following conclusions of law, to wit: (Paragraphs are numbered according to the written Special Conclusions of Law requested by defendants and on file in this cause):

1. The rates and charges assessed and collected upon plaintiff's said shipments of sugar,

as shown and set forth in said Rule V statement annexed as Exhibit "B" to the complaint herein, were published, applied and collected by [194] authority of the Interstate Commerce Commission, and had previously been declared by said Commission to be not unreasonable, after full formal investigation, and/or were less in amount than rates which had previously been declared by said Commission to be reasonable after such investigation, subject only to intervening modifications authorized and/or required by the United States, acting through the Director-General, as the Agent of the President, and/or the Interstate Commerce Commission.

2. Said order of said Interstate Commerce Commission, dated April 14, 1930, and purporting to direct and require said defendants to pay reparation to the plaintiff with respect to its said shipments shown on said Rule V statement, was and is in excess of the lawful jurisdiction of said Commission, and therefore was and is null and void and of no effect.

3. Plaintiff has failed to establish by the evidence any cause of action whatever against the defendants or either or any of them; and has failed to establish that any unreasonable or otherwise unlawful rate or charge was collected upon any of the said shipments, or that any reparation whatsoever is due or payable with respect to said shipments or any of them.

4. Plaintiff is not entitled to recover any

amount whatsoever as fees of its attorneys and counsel in said cause; defendants are entitled to judgment against the plaintiff, that the plaintiff take nothing by its action, and that the complaint herein be dismissed.

which requests were severally denied by the Court, and such conclusions were refused; and the defendants, by their counsel, then and there duly excepted to each and all of said rulings of the Court in failing to make such conclusions of law, and in denying such re- [195] quests.

Defendants by their counsel then and there duly excepted to the ruling of the Court in failing to render and enter judgment in favor of the defendants and against the plaintiff, predicated upon the findings of fact and conclusions of law proposed and requested by defendants.

Thereupon, the Court did then and there in open court make its findings of fact and conclusions of law, and pursuant to stipulation of the parties incorporated therein by reference Exhibit "B" attached to plaintiff's complaint, being the so-called Rule V Statement showing the shipments made to and received by plaintiff upon which reparation is claimed; which said findings and conclusions were afterwards reduced to writing and filed by the Court in the following words and form, to wit:

(Title of Court and Cause.)

No. L-763-Phoenix.

FINDINGS OF FACT, AND CONCLUSIONS OF LAW.

This cause came on regularly for trial, and was tried by the court, sitting without a jury, on the 12th day of October, 1932, a trial by jury having been duly waived by written stipulation of the parties. The parties offered both oral and documentary evidence in support of their respective pleadings herein; and pursuant to stipulation, the parties subsequently, on the 17th day of January, 1933, offered certain oral testimony with respect to the matter of the fees to be allowed plaintiff's attorneys and counsel; and the Court was duly requested to make, enter and file special findings of fact and conclusions of law prior to rendering judgment. The Court does hereby make and file the following as its special findings of fact and conclusions of law: [196]

FINDINGS OF FACT.

I.

That plaintiff is, and was at all times mentioned in plaintiff's complaint, a corporation, organized under the laws of the State of Arizona, and qualified to do business in said State.

II.

Defendants now are, and at all times herein mentioned have been, corporations duly organ-

ized and existing as such, and engaged in the operation of lines of railroad, pursuant to authority of law as common carriers for hire, and in the transportation of property, by means of their said lines of railroad, and in conjunction with connecting carriers in interstate commerce, from points in Arizona.

III.

Heretofore, and at various dates between the 4th day of April, 1921, and the 3d day of December, 1923, both inclusive, plaintiff shipped or caused to be shipped from San Francisco, Crockett, Spreckels, Oxnard, Dyer and Betteravia, California, to Bowie, Arizona, over the lines of said defendants, 31 carload shipments of sugar. There is annexed to the complaint on file herein, as Exhibit "B", a tabulated statement (hereinafter referred to as a "Rule V" statement) which correctly shows in detail among other things, the dates upon which said shipments were made, the dates upon which the transportation charges thereon were collected, the initials and numbers of the cars in which the same were transported, the routes over which said shipments moved, the several weights of said shipments, the rates thereon assessed and the charges thereon collected (said rates and charges being shown under the columns collectively headed "As Charged" upon said statement), the rates subsequently found [197] by the Interstate Commerce Commission to have been

reasonable, and the amounts which would have accrued as charges under said last-mentioned rates (said rates and amounts being shown under the columns collectively headed "Should BE" upon said statement), and the amount of reparation claimed by the plaintiff, and allowed by said Commission, with respect to each of said shipments. Reference is hereby made to said Rule V statement for further particulars, with the same effect as if physically incorporated herein.

IV.

On or about August 14, 1932, plaintiff filed a complaint with the Interstate Commerce Commission, in which it was alleged, among other things, that the rates maintained, assessed, and collected by defendants and other common carriers for the transportation of sugar, in carloads, from various specified points in California, including the points of origin of plaintiff's shipments hereinbefore mentioned, to Bowie, Arizona, were and in future would be unreasonable, in violation of Section 1 of the Interstate Commerce Act. Following the filing of said complaint said Commission caused the same to be assigned Docket No. 14140. Thereafter, and in regular course, the defendants named in said complaint filed their answers thereto with said Commission, in which said answers said defendants denied in particular

that said rates had been, or were, unreasonable, or otherwise in violation of the Interstate Commerce Act as alleged, or that plaintiff had been or would be damaged thereby.

V.

Thereafter, under date of March 12, 1928, said Commission made and entered its report and order in said Docket No. 14140 and associated cases (including a pro- [198] ceeding known as Docket No. 16742) decided concurrently therewith, which said report of the Commission is contained in its official reports: 140 I. C. C., at pp. 171 and following. A true and correct copy of said report and order is annexed to the complaint on file herein, and marked Exhibit "A"; and reference is hereby made to said report for further particulars.

VI.

That the Interstate Commerce Commission issued and filed its Findings of Fact in said matter on the 12th day of March, 1928, which findings are reported in Vol. 140 I. C. C. page 171; that said Commission found that said rates of 86½¢, 96¢ and 96½¢ per hundred pounds charged and collected by said defendants on said shipments from said points of origin to said points of destination were unreasonable as to the plaintiff to the extent that they exceeded the following rates: 83¢ per 100 pounds from Southern California to Bowie, Arizona; 93¢ per 100 pounds from Northern California to Bowie,

Arizona; 75¢ per 100 pounds from Southern California to Bowie, Arizona; 84¢ per 100 pounds from Northern California points to Bowie, Arizona, from and after July 1, 1922, up to and including the 3d day of December, 1923; that said Commission further found in said findings that the plaintiff had been damaged in the amount of the difference between said rates paid by plaintiff and said rates found by said Commission in said proceedings to have been reasonable, and that plaintiff was entitled to reparation therefor on all said shipments, with interest thereon.

VII.

That the plaintiff has duly complied with all the requirements of said Interstate Commerce Commission as to the [199] proof necessary for the amount of said reparation.

VIII.

That on the 14th day of April, 1930, said Interstate Commerce Commission, in Docket No. 16742 and causes consolidated therewith, including said Docket No. 14140, duly made and published its order, directing and requiring the defendants, Southern Pacific Company and Santa Maria Valley Railroad Company, to pay to the plaintiff herein the sum of $81.10, together with interest thereon at the rate of six per cent per annum from the respective dates of payment of the charges collected by the defendants from plaintiff, said sum being the

amount of reparation on account of said unreasonable rate charged and collected by said defendants for transportation of said 31 carload shipments of sugar; said order further directing and requiring the defendant, Southern Pacific Company, to pay to the plaintiff herein the sum of $1,723.01, together with interest thereon at the rate of six per cent per annum from the respective dates of payment of the charges collected by the defendant from plaintiff, said sum being the amount of reparation on account of said unreasonable rate charged and collected by said defendant for transportation of said carload shipments of sugar;

IX.

That the defendants failed and refused to comply with said order to pay said reparation, or any part thereof, though request was made by the plaintiff upon said defendants for payment of same.

X.

That said freight rates charged and collected, as aforesaid, were unjust, unreasonable and excessive as to said plaintiff, and in violation of the Interstate Commerce [200] Act.

XI.

That the just and reasonable freight rates which should have been charged on all said 31 carload shipments from said points of origin in California to said point of destination in Ari-

zona, from and after July 1, 1922, were 93¢ and 84¢ per 100 pounds from points in Northern California and 83¢ and 75¢ per 100 pounds from points in Southern California;

XII.

That by reason of the said unreasonable rates and charges and the payment thereof by plaintiff, and by reason of the refusal of the defendants to pay said reparation in pursuance of said order made by said commission, plaintiff has been damaged by said defendants, Southern Pacific Company and Santa Maria Valley Railroad Company, in the sum of $81.10, together with interest thereon at the rate of six per cent per annum from the respective dates of payment of said charges, as shown on Exhibit "B", attached to plaintiff's complaint, down to and including the date hereof, amounting to the sum of $46.89; and said plaintiff has been damaged by said defendant, Southern Pacific Company, in the sum of $1,723.01, together with interest thereon at the rate of six per cent per annum from the respective dates of payment of said charges, as shown on Exhibit "B", attached to plaintiff's complaint, down to and including the date hereof, amounting to the sum of $1,136.24;

XIII.

That plaintiff herein has been compelled to employ an attorney at law to prosecute the present action to collect said reparation so

awarded by said commission, and that [201] 20% of the total amount found due, including principal and interest, is a reasonable sum to be allowed as attorney's fees.

CONCLUSIONS OF LAW

I.

That said order of the Interstate Commerce Commission, dated April 14, 1930, made and entered in that certain proceeding before said commission, entitled Traffic Bureau of Phoenix Chamber of Commerce, et al., vs. Atchison, Topeka & Santa Fe Railway Company, et al., Docket No. 16742 and causes consolidated therewith, including Docket No. 14140, which said order required said defendants to pay to the plaintiff herein certain sums of money as set forth in said order and in plaintiff's complaint, was, and is, a legal, valid and binding order and was made and entered by said Interstate Commerce Commission in said cause, and was within the power and jurisdiction conferred on said Interstate Commerce Commission in said cause by law, and that in the making of said order said Commission acted within its jurisdiction and power.

II.

That the rates of 96½¢, 96¢, and 96½¢ per 100 pounds charged the plaintiff by the defendants from Dyer, Oxnard, Spreckles, San Francisco, Crockett and Betteravia, California, to

Bowie, Arizona, between the 29th day of July, 1921, and the 3d day of December, 1923, inclusive on said 31 carload shipments of sugar, as shown on Exhibit "B" attached to plaintiff's complaint, were found by the Interstate Commerce Commission in said proceedings, Docket No. 16742 and causes consolidated therewith, including Docket 14140, unreasonable to the extent that said rates exceeded 93¢, 84¢, 83¢ and 75¢ per 100 pounds from said points of [202] origin to said points of destination between said dates, and that the reasonable rate which should have been charged the plaintiff on account of said shipments over defendants' lines were 93¢ and 84¢ per 100 pounds from Northern California, and 83¢ and 75¢ per 100 pounds from Southern California, to Bowie, Arizona, from and after July 1, 1922.

III.

That by reason of said unreasonable charges the plaintiff has been damaged and the defendants, Southern Pacific Company and Santa Maria Valley Railroad Company, are jointly and severally indebted to the plaintiff in the sum of $81.10, together with interest thereon at the rate of six per cent per annum from the respective dates of payment of said charges, as shown on said Exhibit "B", attached to plaintiff's complaint, down to and including the date hereof, amounting to the sum of $46.89, making a total of principal and interest of the sum of $127.99; together with 20% of said total sum,

including principal and interest, as and for attorney's fees, amounting to the sum of $25.59; and the defendant, Southern Pacific Company, is indebted to the plaintiff in the sum of $1,723.01, together with interest thereon at the rate of six per cent per annum from the respective dates of payment of said charges, as shown on said Exhibit "B", attached to plaintiff's complaint, down to and including the date hereof, amounting to the sum of $1,136.24; together with 20% of said total sum, including principal and interest, as and for attorney's fees, amounting to the sum of $571.85, together with plaintiff's costs and disbursements herein expended, and that plaintiff is entitled to judgment therefor.

Dated this 8th day of June, 1933.

F. C. JACOBS,
Judge. [203]

Thereupon defendants did by their counsel in open court, duly except to the findings of fact and conclusions of law of the Court in the following particulars, to wit:

Defendants excepted to paragraph VI of the Court's findings of fact on the ground that the same was and is not sufficiently clear and definite, and was and is not sustained nor supported by the evidence, nor in accord with the evidence and the law.

Defendants excepted to paragraph VII of the Court's findings of fact for the reason that the

same was and is not sustained nor supported by the evidence, and was and is contrary to the evidence and the law, and was and is not sufficiently clear and definite.

Defendants excepted to paragraph VIII of the Court's findings of fact on the ground that the same was and is not sustained nor supported by the record and the evidence, and is contrary to the evidence and the law, and upon the further ground that the same was and is not sufficiently clear, definite and concise.

Defendants excepted to paragraph X of the Court's findings of fact upon the ground that the same was and is not sustained nor supported by the evidence, and was and is wholly contrary to the evidence and the law.

Defendants excepted to paragraph XI of the Court's findings of fact on the ground that the same was and is not sustained nor supported by the evidence, and was and is wholly contrary to the evidence and the law.

Defendants excepted to paragraph XII of the Court's findings of fact upon the ground that the same was and is not sustained nor supported by the evidence, and was and is wholly contrary to the evidence and the law.

Defendants excepted to paragraph XIII of the Court's findings of fact upon the ground that the same was and is not sustained nor supported by the evidence, and was and is wholly contrary to the evidence and the law. [204]

Defendants excepted to paragraph I of the Court's conclusions of law upon the ground that the same was and is not sustained nor supported by the evidence, and was and is wholly contrary to the evidence and the law.

Defendants excepted to paragraph II of the Court's conclusions of law upon the ground that the same was and is not sustained nor supported by the evidence, and was and is wholly contrary to the evidence and the law, and upon the further ground that the same was and is not sufficiently clear, definite and certain.

Defendants excepted to paragraph III of the Court's conclusions of law upon the ground that the same was and is not sustained nor supported by the evidence, and was and is wholly contrary to the evidence and the law, and upon the further ground that the same was and is not sufficiently clear and definite.

Thereafter and on the 8th day of June, 1933, the Court's written findings of fact and conclusions of law as aforesaid were filed in said cause; and thereupon and on the 9th day of June, 1933, the Court, upon motion of plaintiff's attorneys, ordered judgment to be rendered and entered in said cause in favor of the plaintiff and against defendants, which said judgment was and is, in words and figures, as follows:

(Title of Court and Cause)

No. L-763-Phoenix.

JUDGMENT

This cause having come on regularly to be

heard on the 12th day of October, 1932, Samuel White appearing as counsel for the plaintiff, Solomon-Wickersham Company, and Baker & Whitney, Chalmers, Fennemore & Nairn, James E. Lyons and Burton Mason, having appeared as counsel for the defendants, Santa Maria Valley Railroad Company, and Southern Pacific Company; and it having appeared that a stipulation containing an express waiver of the right to [205] trial by jury had been signed by all the parties and filed herein; and evidence, both oral and documentary, having been introduced by the parties hereto, and both sides having rested; and said cause having been argued on behalf of the plaintiff and on behalf of the defendants, and the court having requested the plaintiff and defendants to file briefs on the matters and questions involved; and said cause having been submitted to the court for its consideration and decision;

And on the 17th day of January, 1933, the Court having heard evidence and testimony as to the reasonableness of attorney's fees to be allowed the plaintiff herein for the services rendered herein by its attorney in the trial and determination hereof to the date of this judgment as provided by law;

And on the 12th day of May, 1933, Findings of Fact and Conclusions of Law having been filed and settled by the court, as requested by the parties hereto, and the court having ordered that, in accordance with said findings of fact

and conclusions of law, judgment be entered in favor of the plaintiff and against the defendants in said cause, filed herein, together with costs of plaintiff herein incurred;

NOW, THEREFORE, by virtue of the law and by reason of the premises aforesaid;

It is ORDERED, ADJUDGED and DECREED, that the defendants, Southern Pacific Company and Santa Maria Valley Railroad Company, and each of them, are indebted to the plaintiff in the sum of $81.10, together with interest thereon at the rate of six per cent per annum from the respective dates of payment of the charges collected by the defendants from plaintiff, as shown on Exhibit "B", attached to plain- [206] tiff's complaint, down to and including the date hereof, amounting to the sum of $46.89, making a total of principal and interest of the sum of $127.99; together with 20% of said total sum, including principal and interest, as and for attorney's fees, amounting to the sum of $25.59; and that the defendant, Southern Pacific Company, is indebted to the plaintiff in the sum of $1,723.01, together with interest thereon at the rate of six per cent per annum from the respective dates of payment of said charges, as shown on said Exhibit "B", attached to plaintiff's complaint, down to and including the date hereof, amounting to the sum of $1,136.24; together with 20% of said total sum, including principal and interest, to wit, $2,859.25, as and for attorney's fees, said attorney's fees amount-

ing to the sum of $571.85; together with the sum of $15.90 taxed and allowed as plaintiff's costs and disbursements herein expended.

DONE AND DATED this 9th day of June, 1933.

Defendants, by their counsel, then and there duly excepted to said order for judgment, and to said judgment of the Court, and to every part and portion thereof.

Thereafter, and on or about the 10th day of June, 1933, plaintiff, by its counsel, filed and served a statement of costs, together with a notice of the time and place of application to tax costs; and in said statement said plaintiff claimed as attorney's fees, to be taxed and allowed by the Court herein the sum of $626.56, and as expense of securing from the Interstate Commerce Commission certified copies of Rule V statements, report, and findings, and order of reparation, the sum of $3.90.

Thereafter, on the 16th day of June, 1933, defendants, by their counsel, filed written objections and exceptions to said items of attorneys' fees, and of expense of obtaining said certified copies of documents from said Commission. Thereafter, and on [207] the 17th day of June, 1933, the Clerk of said Court and the Judge thereof, over said objections of defendants, did allow said items as proper items of costs, to which ruling and order the defendants then and there duly excepted.

Within the time allowed by law, as extended by stipulation of the parties, and by order of the Court,

this Bill of Exceptions was served on counsel for the plaintiff and was filed herein.

It is hereby certified that the foregoing Bill of Exceptions tendered by the defendants is complete and correct in every particular, and contains all of the evidence and testimony offered and/or admitted upon proceedings had at any and all hearings in the above entitled cause, together with all of the rulings of the Court in said proceedings, and all of the exceptions allowed; and

Said Bill of Exceptions is hereby certified, settled, and signed as correct in all respects and presented in due time this 9th day of October, 1933.

F. C. JACOBS
United States District Judge. [208]

STIPULATION

IT IS HEREBY STIPULATED, between counsel for the parties to the above-entitled action, that the foregoing Bill of Exceptions, as tendered to the Court by defendants, was presented in time, and is true and correct, and has been duly served upon the plaintiff; and that the same may be settled, allowed, certified and signed by the Court without amendment.

Dated at Phoenix, Arizona, this 5th day of October, 1933.

FRANK L. SNELL, JR.
SAMUEL WHITE
Counsel for Plaintiff.
BAKER & WHITNEY
CHALMERS, FENNEMORE & NAIRN
JAMES E. LYONS
BURTON MASON
Counsel for Defendants.

[Endorsed]: Filed Oct. 9, 1933. [209]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF MONDAY, OCTOBER 9, 1933

Defendants' Bill of Exceptions is now presented to the Court by Alexander B. Baker, Esquire, of counsel for said Defendants, and upon stipulation of respective counsel on file herein,

IT IS ORDERED that said Defendants' Bill of Exceptions be, and the same is hereby settled and allowed. [210]

[Title of Court and Cause—Consolidated Cases.]

PETITION FOR APPEAL

Now come Southern Pacific Company, a corporation, and Santa Maria Valley Railroad Company, a corporation, defendants in the above entitled cause, and say that on or about the 9th day of June, 1933, judgment in said cause was rendered by this Court in favor of the plaintiff, Solomon-Wickersham Company, a corporation, and against said defendants, Southern Pacific Company and Santa Maria Valley Railroad Company by which said defendants were aggrieved; that in said judgment, and the proceedings had prior and subsequent thereto in said cause, certain errors were committed to the prejudice of said defendants, all of which fully appears in detail from the Assignments of Error filed with this petition.

WHEREFORE, said defendants, Southern Pacific Company, a corporation, and Santa Maria Valley Railroad Company, a corporation, hereby pray that an appeal may be allowed to them to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors complained of, and that citation on appeal issue as provided by law; and that a duly authenticated transcript of the record, proceedings and all papers and documents herein may be sent to the United States

Circuit Court of Appeals for the Ninth Circuit, pursuant to law and the rules of said Court in such cases made and provided; and said defendants further pray this Court to [211] fix the amount of the cost and supersedeas bond to be given by the defendants in said cause; and that such other and further proceedings may be had as shall be proper in the premises.

Dated at Phoenix, Arizona, this 5th day of September, 1933.

BAKER & WHITNEY
CHALMERS, FENNEMORE & NAIRN
JAMES E. LYONS
GERALD E. DUFFY
BURTON MASON
Attorneys for Defendants and Appellants.

[Endorsed]: Filed Sep. 5, 1933. [212]

[Title of Court and Cause—Consolidated Cases.]

ASSIGNMENTS OF ERROR.

The defendants in the above-entitled cause, Santa Maria Valley Railroad Company, a corporation, and Southern Pacific Company, a corporation, in connection with their petition for appeal in said cause, make the following assignments of error which they aver occurred upon the trial of said cause, or were committed by the Court in the findings of fact or in the conclusions of law, or in the rendition of judgment, or in other proceedings in said cause:

1.

The Court erred in overruling, and in failing to sustain, defendants' objection to Plaintiff's Exhibit 4, and in receiving said Exhibit 4 in evidence, for the reason that said exhibit was and is incompetent, irrelevant and immaterial, and no proper foundation had been established for the receipt thereof in evidence.

Said exhibit was and is, in words and figures, as follows: [213]

Plaintiff's Exhibit no. 4.

TO	(a) Average Distance	Rates Charged	1	2 Memphis-Southwestern Sugar Rates	3 120 Per Cent Memphis-Southwestern Sugar Rates	4 Rates Prescribed for Reparation Period	5 120 Per Cent Consolidated Southwestern Sugar Rates	6 Rates Prescribed for Future	7	8 Rates in Column 3 Plus Arbitraries	9 Rates Prescribed for Reparation Period	10 Rates in Column 5 Plus Arbitraries	11 Rates Prescribed for Future
	(Miles)			(Cents)	(Cents)	(Cents)	(Cents)	(Cents)	(Cents)	(Cents)	(Cents)	(Cents)	(Cents)
FROM SOUTHERN CALIFORNIA GROUP													
Group 1-													
Yuma	267	SEE		40	48	66	45½	46	20	68	66	65½	66
Group 2-													
Kingman	388			47	56	68	56½	57	12	68	69	68½	69
Group 4-													
Tucson		RULE											
Prescott	539			55	66	73	65	65	12	78	77	77	77
Williams													
Flagstaff		V											
Group 5-													
Winslow		STATEMENTS											
Bisbee													
Bowie	635			59	71	75	72	72	12	83	84	84	84
Douglas													
Holbrook													
Group 6-													
Safford	674			60	72	77	74½	75	12	84	87	86½	87
Group 7-													
Gallup													
Clifton	752			64	77	79	79	79	10	87	89	89	89
Globe													

FROM NORTHERN CALIFORNIA GROUP

REFERENCES

Column 1 See Rule V Statements (or reparation claims).
2 For rates see 77 I.C.C. 595.
3 Rates shown in 77 I.C.C. 595 plus 20 per cent.
4 140 I.C.C. 180
5 Rates shown in 123 I.C.C. 452, 477 plus 20 per cent.
6 140 I.C.C. 181.
7 Arbitraries added by Commission to the rates from Southern California Groups to make the through rates from Northern California Groups, 140 I.C.C. 181.
8 Memphis-Southwestern sugar rates plus 20 per cent plus arbitraries.
9 140 I.C.C. 180.
10 Consolidated Southwestern sugar rates plus 20 per cent plus arbitraries.
11 140 I.C.C. 181.
(a) See Docket 16742, 140 I.C.C. 171, at 178.

2.

The Court erred in receiving in evidence the following testimony offered through plaintiff's Witness, L. G. Reif, and in failing to sustain the objection of the defendants thereto, for the reason that the same was and is incompetent, irrelevant, not the best evidence of the facts asserted, and a mere expression of opinion not founded upon facts in evidence, no proper qualification of the witness having been established; the full substance of the testimony so received over defendants' said objection being as follows:

> "In the Consolidated Southwestern Cases rates on sugar were made on the basis of thirty per cent of the first-class rates. I have formed an opinion as to the reasonableness of the rates here in issue, basing my opinion upon the decision of the Interstate Commerce Commission in Docket No. 14999, and applying to the first-class rates prescribed in that case the percentage relationship employed in the Consolidated Southwestern Cases. Thirty per cent of the first-class rate prescribed in Docket No. 14999 from California points to Arizona would produce, for the distance of 961 miles representing the average from the San Francisco group to Bowie, Arizona, a rate of 90 cents. For reparation purposes the Commission in the instant case prescribed a rate of 84 cents. Taking the rates actually published by the carriers following the decision in Docket 14999, which were lower than were prescribed, because of the as-

serted water competition, and applying 30 per cent to those rates, the resulting rate on sugar from the San Francisco group to Bowie would be 80 cents."

3.

The Court erred in failing to sustain defendants' objection [216] to the following testimony offered through plaintiff's Witness L. G. Reif, and in admitting said testimony, over the objection of defendants, upon the ground that the same was and is incompetent, irrelevant and immaterial, and that the witness had established no proper qualification to offer such testimony, the full substance of the testimony so received over defendants' said objection being as follows: (The witness was asked by plaintiff's counsel whether he had in mind the comment made by the Commission in its decision in Docket 16742, 140 I. C. C. 171, in saying that the record in the First Phoenix Case, 62 I. C. C. 412, was not complete, and that a lower rate might have been justified upon a more comprehensive record.)

"A lower rate to Phoenix might have been justified upon a more comprehensive record in the First Phoenix Case. In the opinion in Docket 16742, at page 180, the Commission said that the prior record was incomplete, and that this was the first comprehensive record they had had. The record in the First Case was incomplete, because all that was asked for was a removal of discrimination."

4.

The Court erred in failing to grant, and in overruling, defendants' motion for a non-suit against plaintiff, and for the entry of an order dismissing the complaint, and for the entry of judgment against the plaintiff and in favor of the defendants, made at the conclusion of the plaintiff's testimony in chief, for the reason that plaintiff's said testimony showed affirmatively that it had no right to recover, in that its entire complaint was and is predicated upon an order for the payment of reparation made by the Interstate Commerce Commission, which said order was and is void and of no effect, because beyond the power and jurisdiction of said Commission; and for the further reason that the affirmative showing [217] made by the plaintiff demonstrated that the rates charged upon the shipments as to which reparation was and is demanded were not unjust, unreasonable, or otherwise unlawful at the time of their application.

5.

The Court erred in denying defendants' motion, made at the conclusion of the testimony, for the rendition and entry of judgment in favor of the defendants and against the plaintiff, upon the pleadings and the evidence, for the reason that such judgment in favor of defendants was and is sustained and justified by all the evidence, and justified and required by the law.

6.

The Court erred in finding and concluding that

a reasonable sum to be allowed as the fees of plaintiff's attorneys and counsel, on account of their services rendered in this cause, should be twenty per cent of the total amount recovered, and in rendering and entering its order allowing to plaintiff's attorneys said fee of twenty per cent of the total amount recovered; for the reason that said finding, conclusion and order, and each of them, are not sustained or supported by the evidence, and are contrary to the evidence and the law, particularly in that said amount so found by the Court to be reasonable as attorneys' fees is so clearly too large, in view of the services rendered, as to amount to an abuse by the Court of its discretion.

7.

The Court erred in refusing to find the following facts, which were requested by defendants, to-wit:

> 6. Thereafter, pursuant to said report, and in accordance with Rule V of the Rules of Practice of said Commission, plaintiff prepared the aforesaid Rule V statement showing the shipments upon which reparation was claimed, a copy of which is attached to the complaint herein, as Exhibit "B", [218] as heretofore set forth.

said requested findings being contained in paragraph 6 of defendants' proposed special findings of fact, for the reason that said proposed findings requested by defendants were conclusively proven by the evidence, and were and are material to the issue.

8.

The Court erred in refusing to find the following facts, which were requested by defendants, to-wit:

> 7. Thereafter, under date of April 14th, 1930, said Commission made and entered its order directing and requiring said defendants to pay to the plaintiff, on or before May 31, 1930, as reparation and damages, the amounts set opposite their respective names in said order, with interest thereon at the rate of six (6) per cent per annum from the respective dates of the payment of charges as shown in said Rule V statements. A copy of said reparation order is annexed as Exhibit "C" to the complaint on file herein, and is hereby referred to for further particulars.

said requested findings being contained in paragraph 7 of defendants' proposed special findings of fact, for the reason that said proposed findings requested by defendants were conclusively proven by the evidence, and were and are material to the issues.

9.

The Court erred in refusing to find the following facts, which were requested by defendants, to-wit:

> 9. Under date of May 25, 1915, in response to a complaint attacking as unreasonable the rates on sugar in carloads from all points in California to all destinations in Arizona (including Bowie) said Commission, after full hearing and investigation, rendered its report

and order in a proceeding known and entitled as Docket No. 6806, Ariz. Corp. Comm. [219] v. A. T. & S. F. Ry. Co., et al., 34 I. C. C. 158. Reference is hereby made to said report of said Commission, as set forth in its official reports, for further particulars.

As more fully appears from said report, the complaint in said Docket No. 6806 was filed with the Commission on April 15, 1914. During the pendency of said proceeding the carriers named as defendants therein voluntarily reduced their rates on sugar from all points of origin in California to substantially all destinations in Arizona, including Bowie. Such voluntary reductions included in particular the establishment of rates on sugar, in carloads, from all said points in California to all said destinations in Arizona, subject to a minimum weight of 60,000 pounds per car, which rates were in all cases less than the rates theretofore applying from and to the same points in connection with a carload minimum weight of 36,000 pounds. In and by its said report in said Docket No. 6806 said Commission duly found, among other things, that said rates on sugar to Bowie, as voluntarily reduced during the pendency of said proceeding, were and in future would be just and reasonable. No order respecting said rates to Bowie was made by said Commission in said proceeding.

The character and extent of said voluntary reductions, and in particular of the reductions in the rates to Bowie, is fully set forth in said report in said Docket No. 6806.

said requested findings being contained in paragraph 9 of defendants' proposed special findings of fact, for the reason that said proposed findings requested by defendants were conclusively proven by the evidence, and were and are material to the issues.

10.

The Court erred in refusing to find the following facts, which [220] were requested by defendants, to-wit:

10. In compliance with the Commission's said findings in said Docket No. 6806, the carriers parties to the rates therein involved continued until and including December 29, 1917 the rates on sugar in carloads, from the several points in California to the destination in Arizona involved in this cause, which were in effect on said May 25, 1915. Upon said December 29, 1917, possession, control and operation of the railroad properties of the defendants and generally of all other railroad common carriers throughout the United States were assumed by the Director-General of Railroads, as Agent of the President of the United States, and said Director-General continued in such possession, control and operation until and including February 29, 1920. Said rates hereto-

fore last-mentioned were continued in effect by said Director-General from and after said December 29, 1917, until, but not including, June 25, 1918. On June 25, 1918, said Director-General caused said rates to be increased as specified and provided in General Order No. 28, issued by said Director-General pursuant to authority conferred by the Federal Control Act, 40 Stat. L. 456. Upon November 25, 1919, said rates, as modified by the changes made pursuant to said General Order No. 28, were further modified pursuant to and as provided by an order duly issued by said Director-General, styled "Freight Rate Authority No. 8016, dated May 16, 1919". Said order last mentioned, also issued pursuant to authority duly conferred by said Federal Control Act, brought about a general readjustment of rates on sugar throughout the western part of the United States. On February 29, 1920, said Director-General, by order duly made, further modified said rates heretofore mentioned by canceling the [221] rate from California points to Bowie, then and theretofore in effect, subject to a carload minimum weight of 36,000 pounds. The rate then and theretofore in effect from and to said points, subject to a carload minimum weight of 60,000 pounds, was continued without further modification until, but not including, August 26, 1920.

said requested findings being contained in paragraph 10 of defendants' proposed special findings

of fact, for the reason that said proposed findings requested by defendants were conclusively proven by the evidence, and were and are material to the issues.

11.

The Court erred in refusing to find the following facts, which were requested by defendants, to-wit:

> 11. On March 1st, 1920, upon termination of Federal control, the several defendants and other carriers resumed possession and control of their railroad properties. Said carriers, parties to the rates on sugar from California points to Bowie, maintained from and after said last mentioned date until, but not including, August 26, 1920, said rate on sugar subject to a carload minimum weight of 60,000 pounds which was in effect from and to said points at the date of termination of Federal control. On said date last mentioned said rate was increased to 96½ cents per hundred pounds, as authorized by the report and order of said Commission in the proceeding entitled Ex parte 74, Increased Rates 1920, 58 I. C. C. 220, to which report reference is hereby made for further particulars. Said report and order authorized general percentage advances in interstate freight rates throughout the United States.

said requested findings being contained in paragraph 11 of defendants' proposed special findings of fact, for the reason that said [222] proposed

findings requested by defendants were conclusively proven by the evidence, and were and are material to the issues.

12.

The Court erred in refusing to find the following facts, which were requested by defendants, to-wit:

> 12. Said rate of 96½ cents, as made effective August 26, 1920, was voluntarily reduced by said defendants, effective July 27, 1921, to 96 cents; and was further voluntarily reduced by said defendants, effective July 1st, 1922, to 86½ cents. Said reduction last-mentioned was in conformity with the recommendations made by said Commission in its report in a proceeding entitled: Reduced Rates, 1922, 68 I. C. C. 676, to which report reference is hereby made for further particulars. Said rate of 86½ cents last-mentioned was further voluntarily reduced by said defendants, on or about January 11, 1924, to 84 cents. Said rates of 96½ cents, 96 cents, and 86½ cents, which were successively in effect during the period August 26, 1920, to January 10, 1924, both inclusive, were the rates assessed upon plaintiff's shipments during the period of movement thereof, as shown upon said Rule V statement annexed to the complaint herein, and are the rates referred to "As Charged" upon said statement.

said requested findings being contained in paragraph 12 of defendants' proposed special findings of fact, for the reason that said proposed findings

requested by defendants were conclusively proven by the evidence, and were and are material to the issues.

13.

The Court erred in refusing to find the following facts, which were requested by defendants, to-wit:

13. On or about the 22nd day of June, 1921, and after full hearing and investigation, said Commission rendered [223] its report and order in a proceeding entitled Docket No. 11532, Traffic Bureau, Phoenix Chamber of Commerce, et al. v. Director General, et al., 62 I. C. C. 412 (to which report reference is hereby made for further particulars) wherein and whereby said Commission found, among other things, that the reasonable rate thereafter to be applied to the transportation of sugar in carloads, minimum weight 60,000 pounds, from points of origin in California (including the points of origin of the plaintiff's shipments involved herein) to Phoenix, Arizona, should not exceed 96½ cents per hundred pounds. The usual and customary routes of movement from said points of origin in California to Phoenix, Arizona, were at all times prior to November 1, 1926, identical with the direct routes of movement of shipments from said points to Bowie, Arizona, as far as and including Maricopa, Arizona, a point 35 miles by rail from Phoenix; and the distances over said routes of movement from said points of origin in California to Phoenix were at all

times during the period of movement of the plaintiff's shipment involved herein, 160 miles less than the corresponding distances from said points of origin to Bowie. Said order of said Commission in said proceeding last mentioned, Docket No. 11532, specified that said rate of 96½ cents should be observed as the reasonable maximum rate from California points to Phoenix until the further order of said Commission; and no further order with respect to said rate was made by said Commission during the period of movement of the plaintiff's shipments or until about February 25, 1925. During all of said period of movement said rate of 96½ cents was, and continued to be, the duly established and conclusive measure of [224] the just and reasonable rate on sugar from the points of origin in California involved herein to Phoenix and related points in Arizona, including Bowie.

said requested findings being contained in paragraph 13 of defendants' proposed special findings of fact, for the reason that said proposed findings requested by defendants were conclusively proven by the evidence, and were and are material to the issues.

14.

The Court erred in refusing to find the following facts, which were requested by defendants, to-wit:

14. On November 3, 1921, and after full hearing, said Commission rendered its report and order in a proceeding entitled Docket No. 11442, Traffic Bureau, Douglas Chamber of Commerce & Mines v. A. T. & S. F. Ry. Co., et al., 64 I. C. C. 405 (to which report of said Commission reference is hereby made for further particulars), in response to a complaint alleging, among other things, that the rates on sugar, in carloads, from points in California, including all of the points of origin of the plaintiff's shipments, to Douglas, Arizona, were and in future would be unreasonable and otherwise in violation of the Interstate Commerce Act. In said report said Commission found that said rate, which at the date of said complaint was 96½ cents per hundred pounds, was and in future would be not unreasonable. No further findings or order with respect to said rate to Douglas were made by said Commission subsequent to the report in said Docket No. 11442, until March 12, 1928, the date of the findings and order in said Docket No. 16742, and associated cases, to which reference has heretofore been made. The direct and actual routes of movement of plaintiff's shipments from points of origin in California to Bowie, Arizona, during all of the period of the movement thereof, were [225] identical with the direct routes over which shipments of sugar moved from said points of origin to Douglas, Arizona, as far as and including Tucson, Arizona, a point about

124 miles westerly from Douglas and about 115 miles westerly from Bowie; and the distances from said points of origin in California to Douglas, Arizona, were, during all of said times, less than 10 miles greater than the corresponding distances from said points of origin to Bowie. During all of the period of movement of the plaintiff's shipments, said rate of 96½ cents to Douglas, found reasonable by said Commission in its report in said Docket No. 11442, was and continued to be the duly established and conclusive measure of a just and reasonable rate for the transportation of shipments of sugar from the points of origin of plaintiff's shipments to Douglas and related points in Arizona, including Bowie in particular.

said requested findings being contained in paragraph 14 of defendants' proposed special findings of fact, for the reason that said proposed findings requested by defendants were conclusively proven by the evidence, and were and are material to the issues.

15.

The Court erred in refusing to find the following facts, which were requested by defendants, to-wit:

15. On June 27, 1923, after full hearing, and in response to a complaint alleging among other things that the rates on sugar in carloads from points in California, including the points of

origin of plaintiff's shipments, to destinations in Arizona on the Globe Division of the Arizona Eastern Railroad Company (now the Globe Branch of the Southern Pacific Company) were unreasonable and otherwise in violation of the Interstate Commerce Act, said Commission rendered its report and order in a proceeding [226] entitled Docket No. 13139: Graham & Gila Counties Traffic Assn. v. A. E. R. Co., et al., 81 I. C. C. 134. In said report said Commission found and declared that said rates, as in effect on January 18, 1922, were and in future would be not unreasonable and reference is hereby made to said report for further particulars. On said date, January 18, 1922, the rate on shipments of sugar in carloads from the points of origin of the plaintiff's shipments to Globe, Arizona, was $1.59 per hundred pounds; the corresponding rate on sugar from said points of origin to Safford, Arizona, was $1.29; both said points, Globe and Safford, being located upon said Globe Division, heretofore referred to. The direct routes from the points of origin of plaintiff's shipments to Globe and Safford, were, at all times involved in this cause, identical with the direct routes from said points of origin to Bowie, as far as, and including, Bowie itself; Bowie being the point of junction of said Globe Division of the Arizona Eastern with the main line of the Southern Pacific extending from Tucson, Arizona, via Bowie, to El Paso, Texas. At all

> said times the distances from said points of origin to Globe and Safford were, respectively, 124 miles, and 40 miles, greater than to Bowie. During all said times said rates of $1.59 to Globe and $1.29 to Safford were, and continued to be, duly established and conclusive measures of the transportation services to which they respectively applied, and of similar transportation services over the same lines to related destinations.

said requested findings being contained in paragraph 15 of defendants' proposed special findings of fact, for the reason that said proposed findings requested by defendants were conclusively proven [227] by the evidence, and were and are material to the issues.

16.

The Court erred in refusing to find the following facts, which were requested by defendants, to-wit:

> 16. The rates and charges assessed and collected upon the plaintiff's said shipments, as set forth upon said Rule V statement annexed to the complaint, were, and each of them was, just and reasonable, and in full conformity with the Interstate Commerce Act, and were, and each of them was, lawfully applied, assessed and collected by the said defendants.

said requested findings being contained in paragraph 16 of defendants' proposed special findings of fact, for the reason that said proposed findings requested by defendants were conclusively proven by the evidence, and were and are material to the issues.

17.

The Court erred in finding the following facts, which were requested by the plaintiff, to-wit:

VI.

That the Interstate Commerce Commission issued and filed its findings of fact in said matter on the 12th day of March, 1928, which findings are reported in Vol. 140 I. C. C. page 171; that said commission found that said rates of 86½¢, 96¢ and 96½¢ per hundred pounds charged and collected by said defendants on said shipments from said points of origin to said points of destination were unreasonable as to the plaintiff to the extent that they exceeded the following rates: 83¢ per 100 pounds from Southern California to Bowie, Arizona; 93¢ per 100 pounds from Northern California to Bowie, Arizona; 75¢ per 100 pounds from Southern California to Bowie, Arizona, 84¢ per 100 pounds from Northern California points to Bowie, [228] Arizona, from and after July 1, 1922, up to and including the 3d day of December, 1923; that said commission further found in said findings that the plaintiff had been damaged in the amount of the difference between said rates paid by plaintiff and said rates found by said commission in said proceedings to have been reasonable, and that plaintiff was entitled to reparation therefor on all said shipments, with interest thereon.

which are contained in paragraph VI of findings

of fact requested by plaintiff, and in paragraph VI of findings of fact adopted by the Court, for the reason that the same were and are not sufficiently clear and definite, and were and are not sustained or supported by the evidence, nor in accord with the evidence and the law.

18.

The Court erred in finding the following fact, which was requested by the plaintiff, to-wit:

VII.

> That the plaintiff has duly complied with all the requirements of said Interstate Commerce Commission as to the proof necessary for the amount of said reparation.

which is contained in paragraph VII of findings of fact requested by plaintiff, and in paragraph VII of findings of fact adopted by the Court, for the reason that the same is not sustained nor supported by competent evidence, and is contrary to the evidence and the law, and is not sufficiently clear and definite, there being no competent evidence whatsoever upon which to base such finding.

19.

The Court erred in finding the following facts, which were requested by the plaintiff, to-wit:

VIII.

> That on the 14th day of April, 1930, said Interstate Commerce Commission, in Docket No. 16742 and causes [229] consolidated therewith, including said Docket No. 14140, duly

made and published its order, directing and requiring the defendants, Southern Pacific Company and Santa Maria Valley Railroad Company, to pay to the plaintiff herein the sum of $81.10, together with interest thereon at the rate of six per cent per annum from the respective dates of payment of the charges collected by the defendants from plaintiff, said sum being the amount of reparation on account of said unreasonable rate charged and collected by said defendants for transportation of said 31 carload shipments of sugar; said order further directing and requiring the defendant, Southern Pacific Company, to pay to the plaintiff herein the sum of $1,723.01, together with interest thereon at the rate of six percent per annum from the respective dates of payment of the charges collected by the defendant from plaintiff, said sum being the amount of reparation on account of said unreasonable rate charged and collected by said defendant for transportation of said carload shipments of sugar.

which is contained in paragraph VIII of findings of fact requested by plaintiff, and in paragraph VIII of findings of fact adopted by the Court, for the reason that the said finding is not sustained or supported by the record or the evidence, and is contrary to the evidence and the law, and is not sufficiently clear, definite and concise.

20.

The Court erred in finding the following facts, which were requested by the plaintiff, to-wit:

X.

That said freight rates charged and collected, as aforesaid, were unjust, unreasonable and excessive as to said plaintiff, and in violation of the Interstate Com- [230] merce Act.

which are contained in paragraph X of findings of fact requested by plaintiff, and in paragraph X of the findings of fact adopted by the Court, for the reason that there is no competent evidence to sustain such findings, and the same are not supported by and are contrary to the evidence and the law; it having been affirmatively shown, by the admitted and uncontradicted evidence introduced by defendants, that the charges assessed and collected upon plaintiff's said shipments were just, reasonable and lawful, and were in fact less in amount than charges which would have accrued under a rate which had previously been declared to be just and reasonable, by a prior valid formal finding of the Interstate Commerce Commission, which rate was continued in effect throughout the period of movement of plaintiff's shipments, subject only to changes authorized and/or required by the Commission itself or by the President of the United States acting through the Director-General of Railroads.

21.

The Court erred in finding the following fact, which was requested by the plaintiff, to-wit:

That the just and reasonable freight rates which should have been charged on all said 31 carload shipments from said points of origin in

California to said point of destination in Arizona, from and after July 1, 1922, were 93¢ and 84¢ per 100 pounds from points in Northern California and 83¢ and 75¢ per 100 pounds from points in Southern California.

which is contained in paragraph XI of findings of fact requested by plaintiff, and in paragraph XI of findings of fact adopted by the Court, for the reason that the same is not sustained or supported by the evidence, and was and is wholly contrary to the [231] evidence and the law, and was and is not sufficiently clear and definite.

22.

The Court erred in finding the following facts, which were requested by the plaintiff, to-wit:

XII.

That by reason of said unreasonable rates and charges and the payment thereof by plaintiff, and by reason of the refusal of the defendants to pay said reparation in pursuance of said order made by said commission, plaintiff has been damaged by said defendants, Southern Pacific Company and Santa Maria Valley Railroad Company, in the sum of $81.10, together with interest thereon at the rate of six per cent per annum from the respective dates of payment of said charges, as shown on Exhibit "B", attached to plaintiff's complaint, down to and including the date hereof, amounting to the sum of $46.89; and said plaintiff has been damaged by said defendant, Southern Pacific Com-

pany, in the sum of $1,723.01, together with interest thereon at the rate of six per cent per annum from the respective dates of payment of said charges, as shown on Exhibit "B", attached to plaintiff's complaint, down to and including the date hereof, amounting to the sum of $1,136.24.

which are contained in paragraph XII of findings of fact requested by plaintiff, and in paragraph XII of findings of fact adopted by the Court for the reason that such findings are not sustained nor supported by the evidence and are contrary to the evidence and the law, in that there is no competent evidence to show that any unreasonable rates and/or charges were ever collected by the defendants from the plaintiff, or paid by the plaintiff to the defendants or any of them, or that any of the defendants have ever refused to [232] pay any reparation properly and lawfully awarded by the Interstate Commerce Commission to plaintiff, or that plaintiff has ever been damaged by reason of the collection of the rates and charges referred to in the complaint herein.

23.

The Court erred in finding the following facts, which were requested by the plaintiff, to-wit:

XIII.

That plaintiff herein has been compelled to employ an attorney at law to prosecute the present action to collect said reparation so awarded by said Commission, and that 20% of

the total amount found due, including principal and interest, is a reasonable sum to be allowed as attorney's fees.

which are contained in paragraph XIII of findings of fact requested by plaintiff, and in paragraph XIII of findings of fact adopted by the Court, for the reasons that such findings are not sustained or supported by the evidence, and are contrary to the evidence and the law; and for the further reason that the amount so found by the Court to be reasonable as an attorney's fee in this cause is so clearly too large, in view of the services rendered as to amount to an abuse of discretion by the Court.

24.

The Court erred in making the following conclusion of law, which was requested by plaintiff, to-wit:

I.

That said order of the Interstate Commerce Commission, dated April 14, 1930, made and entered in that certain proceeding before said Commission, entitled Traffic Bureau of Phoenix Chamber of Commerce, et al. vs. Atchison, Topeka & Santa Fe Railway Company, et al., Docket No. 16742 and causes consolidated therewith, including Docket No. 14140, which [233] said order required said defendants to pay to the plaintiff herein certain sums of money as set forth in said order and in plaintiff's complaint, was, and is, a legal, valid and binding order and was made and entered by said Interstate Commerce Commission in said cause, and was

within the power and jurisdiction conferred on said Interstate Commerce Commission in said cause by law, and that in the making of said order said Commission acted within its jurisdiction and power.

which is contained in paragraph I of the conclusions of law requested by plaintiff, and in paragraph I of the conclusions of law adopted by the Court, for the reason that such conclusion is not sustained or supported by competent evidence, and is contrary to the evidence and the law, in that the evidence shows without conflict that said purported order of said Commission, dated April 14th, 1930, undertakes to require defendants to pay reparation for the collection of rates and charges which were in all respects just, reasonable and lawful, and were duly and lawfully published and assessed in conformity with prior valid findings made by said Commission, and were less in amount than a rate previously prescribed and/or approved as reasonable by said Commission, which were continued and maintained throughout the period of movement of plaintiff's shipments, subject only to changes made by authority of the Director-General of Railroads, as Agent of the President of the United States, and/or of said Commission.

25.

The Court erred in making the following conclusion of law which was requested by plaintiff, to-wit:

II.

That the rates of 86½¢, 96¢, and 96½¢ per 100 pounds charged the plaintiff by the defendants

> from Dyer, Oxnard, Spreckles, San Francisco, Crockett and Betteravia, Cali- [234] fornia, to Bowie, Arizona, between the 29th day of July, 1921, and the 3d day of December, 1923, inclusive, on said 31 carload shipments of sugar, as shown on Exhibit "B" attached to plaintiff's complaint, were found by the Interstate Commerce Commission in said proceedings, Docket No. 16742 and causes consolidated therewith, including Docket 14140, unreasonable to the extent that said rates exceeded 93¢, 84¢, 83¢ and 75¢ per 100 pounds from said points of origin to said points of destination between said dates, and that the reasonable rate which should have been charged the plaintiff on account of said shipments over defendants' lines were 93¢ and 84¢ per 100 pounds from Northern California, and 83¢ and 75¢ per 100 pounds from Southern California, to Bowie, Arizona, from and after July 1, 1922.

which is contained in paragraph II of conclusions of law requested by plaintiff, and in paragraph II of conclusions of law adopted by the Court, for the reason that such conclusion is not sustained or supported by the evidence, and is contrary to the evidence and the law, and for the reasons hereinbefore assigned in connection with assignments of errors Nos. 20, 22 and 24.

26.

The Court erred in finding the following conclusion of law, which was requested by the plaintiff, to-wit:

III.

That by reason of said unreasonable charges the plaintiff has been damaged and the defendants, Southern Pacific Company and Santa Maria Valley Railroad Company, are jointly and severally indebted to the plaintiff in the sum of $81.10, together with interest thereon at the rate of six per cent per annum from the respective dates of payment of said charges, as shown on said Exhibit "B", attached to plaintiff's complaint, down to and including the date hereof, [235] amounting to the sum of $46.89, making a total of principal and interest of the sum of $127.99; together with 20% of said total sum, including principal and interest, as and for attorney's fees, amounting to the sum of $25.59; and the defendant, Southern Pacific Company, is indebted to the plaintiff in the sum of $1,723.01 together with interest thereon at the rate of six per cent per annum from the respective dates of payment of said charges, as shown on said Exhibit "B", attached to plaintiff's complaint, down to and including the date hereof, amounting to the sum of $1,136.24; together with 20% of said total sum, including principal and interest, as and for attorney's fees, amounting to the sum of $571.85, together with plaintiff's costs and disbursements herein expended, and that plaintiff is entitled to judgment therefor.

which is contained in paragraph III of conclusions of law requested by plaintiff, and in paragraph III of conclusions of law adopted by the Court, for

the reasons that such conclusion is not sustained or supported by the evidence and is contrary to the evidence and the law, and for the particular reasons hereinbefore assigned in connection with assignments of errors Nos. 20, 22, 24 and 25.

27.

The Court erred in failing and refusing to make the following conclusion of law, which was requested by defendants as paragraph 1 of their requested conclusions of law, to-wit:

> 1. The rates and charges assessed and collected upon plaintiff's said shipments of sugar, as shown and set forth in said Rule V statement annexed as Exhibit "B" to the complaint herein, were published, applied and collected by authority of the Interstate Commerce Commission, and had previously been declared by said Commission to be not un- [236] reasonable, after full formal investigation, and/or were less in amount than rates which had previously been declared by said Commission to be reasonable after such investigation, subject only to intervening modifications authorized and/or required by the United States, acting through the Director-General, as the agent of the President, and/or the Interstate Commerce Commission.

for the reason that such conclusion is established by uncontradicted testimony, and conforms to and is justified and required by the evidence and the law, and is material to the issues in the cause.

28.

The Court erred in failing and refusing to make

the following conclusion of law, which was requested by defendants as paragraph 2 of their requested conclusions of law, to-wit:

> 2. Said order of said Interstate Commerce Commission, dated April 14, 1930, and purporting to direct and require said defendants to pay reparation to the plaintiff with respect to its said shipments shown on said Rule V statement, was and is in excess of the lawful jurisdiction of said Commission and therefore was and is null and void and of no effect.

for the reason that such conclusion is established by uncontradicted testimony, and conforms to and is justified and required by the evidence and the law, and is material to the issues in the cause.

29.

The Court erred in failing and refusing to make the following conclusion of law, which was requested by defendants as paragraph 3 of their requested conclusions of law, to-wit:

> 3. Plaintiff has failed to establish by the evidence any cause of action whatever against the defendants or either or any of them; and has failed to establish that [237] any unreasonable or otherwise unlawful rate or charge was collected upon any of the said shipments, or that any reparation whatsoever is due or payable with respect to said shipments or any of them.

for the reason that such conclusion is established by uncontradicted testimony, and conforms to and is justified and required by the evidence and the law, and is material to the issues in the cause.

30.

The Court erred in failing and refusing to make the following conclusion of law, which was requested by defendants as paragraph 4 of their requested conclusions of law, to-wit:

> 4. Plaintiff is not entitled to recover any amount whatsoever as fees of its attorneys and counsel in said cause; defendants are entitled to judgment against the plaintiff, that the plaintiff take nothing by its action, and that the complaint herein be dismissed.

for the reason that such conclusion is established by uncontradicted testimony, and conforms to and is justified and required by the evidence and the law, and is material to the issues in the cause.

31.

The Court erred in failing to render and enter judgment in favor of defendants and against the plaintiff, predicated upon the findings of fact and conclusions of law proposed and requested by defendants, for the reason that such judgment in favor of the defendants is justified and required by all the evidence and the law; and for the further reasons hereinbefore assigned, particularly in connection with Assignments of Error Nos. 6 to 16, inclusive, and 27 to 30, inclusive.

32.

The Court erred in rendering and ordering judgment, upon the facts found, in favor of plaintiff and against the defendants, and in refusing to render and enter such judgment in favor of the [238] de-

fendants, for the reason that the facts as found by the Court are not sufficient to support the judgment in favor of the plaintiff; in that said judgment is based solely upon the theory that the Interstate Commerce Commission, on April 14, 1930, issued a lawful, valid and binding order directing said defendants to pay to the plaintiff certain sums as reparation for the collection of alleged unreasonable rates and charges upon carload shipments of sugar from points in Califorina to Bowie, Arizona, moving during the period April 4, 1921, to December 3, 1923, both inclusive; whereas the uncontradicted testimony shows that the rates assessed and the charges collected by said defendants for the transportation of said shipments were duly and regularly published, applied and collected by authority of said Commission, and were equal to, or less than, rates which had previously been prescribed and/or approved as reasonable by prior formal findings of said Commission, which said rates as so prescribed and/or approved had been maintained in effect, without modification other than general changes duly authorized and/or required by the United States, acting through the Director-General of Railroads as the Agent of the President, and through said Commission; and said order of said Commission purporting to award reparation is therefore void and of no effect, because in excess of the jurisdiction conferred by law upon said Commission; and for the further reason that said rates and charges collected upon plaintiff's said shipments were conclusively shown, by uncontradicted testimony, to

have been and to be just, reasonable, and otherwise in conformity with law at the times of their assessment and collection.

WHEREFORE, defendants pray that the judgment of the District Court in the above-entitled cause may be reversed.

BAKER & WHITNEY,
CHALMERS, FENNEMORE & NAIRN,
JAMES E. LYONS,
GERALD E. DUFFY,
BURTON MASON,
Attorneys for Defendants. [239]

[Endorsed]: Filed Sep. 5, 1933. [240]

[Title of Court and Cause—Consolidated Cases.]

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF COST AND/OR SUPERSEDEAS BOND

On the 5th day of September, 1933, the above entitled defendants, by their attorneys, filed herein and presented to this Court their Petition for the Allowance of an Appeal in said Cause, together with assignments of error intended to be urged by them, praying also that a duly authenticated transcript of the record, proceedings and all papers and documents upon which the judgment herein was rendered may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that citation issue; and further praying that this Court fix the amount of the cost and/or supersedeas bond to be given by said defendants in this cause; and that

such other and further proceedings be had as may be proper in the premises:

NOW, THEREFORE, upon consideration thereof, this Court does hereby allow said appeal as prayed for, and does hereby fix the amount of the cost and/or supersedeas bond in the sum of Forty-five Hundred Dollars ($4500.00), and does hereby order that such bond shall operate as a supersedeas bond.

Dated this 5th day of September, 1933.

F. C. JACOBS
Judge of the United States District Court,
for the District of Arizona. [241]

[Endorsed]: Filed Sep. 5, 1933. [242]

[Title of Court and Cause—Consolidated Cases.]

BOND

KNOW ALL MEN BY THESE PRESENTS: That Southern Pacific Company, a corporation, and Santa Maria Valley Railroad Company, a corporation, as principals, and Pacific Indemnity Company, a corporation, as surety are held and firmly bound unto Solomon-Wickersham Company, a corporation, plaintiff in the above entitled action, in the full and just sum of Forty-five Hundred ($4500.00) Dollars, to be paid to said Solomon-Wickersham Company, its successors or assigns; for the payment of which sum well and truly to be made we hereby bind ourselves, our successors and assigns, jointly and severally by these presents.

Signed and sealed this 5th day of September, 1933.

The condition of this obligation is such that whereas a certain judgment and decision in the above entitled cause was rendered in favor of said plaintiff, Solomon-Wickersham Company, a corporation, and against said defendants, Southern Pacific Company, a corporation, and Santa Maria Valley Railroad Company, a corporation, on or about the 9th day of June, 1933, by the Honorable F. C. Jacobs, presiding Judge of the above entitled cause and court, and whereas, the said defendants, Southern Pacific Company, a corporation, and Santa Maria Valley Railroad Company, a corporation, after the entry and filing of said [243] judgment duly filed and presented to the above entitled court their petition, praying for the allowance of an appeal for the review of said judgment by the United States Circuit Court of Appeals for the Ninth Circuit, for the purpose of reversing said judgment, and said appeal was allowed by the said Honorable F. C. Jacobs, presiding Judge of the United States District Court for the District of Arizona, upon the said defendants giving bond, according to law, in the sum of Forty-five Hundred ($4500.00) Dollars, which said bond shall operate as a supersedeas bond.

NOW, THEREFORE, if the said Southern Pacific Company, a corporation, and Santa Maria Valley Railroad Company, a corporation, defendants above named, shall prosecute their said appeal to effect and shall pay the amount of said judgment and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, otherwise it shall remain in full force and effect.

And the said surety in this obligation hereby covenants and agrees that in case of a breach of any condition of this bond the United States District Court for the District of Arizona may, upon notice to said surety of not less than ten (10) days proceed summarily in this cause to ascertain the amount which said surety is bound to pay on account of such breach and render judgment therefor against said surety and to order execution therefor. [244]

IN WITNESS WHEREOF, the undersigned have executed this bond this said 5th day of September, 1933.

SOUTHERN PACIFIC COMPANY,
a Corporation,
[Corporate Seal]
By J. H. Dyer
Its Vice President

Attest:
G. L. KING
Its Asst. Secretary

SANTA MARIA VALLEY RAILROAD COMPANY, a Corporation,
[Corporate Seal]
By Raymond W. Stephens
Its Vice President

Attest:
LEROY E. SULLIVAN
Its Secretary

PRINCIPALS.

PACIFIC INDEMNITY COMPANY
By D. Ray Kleinman [Seal]
[Seal] Attorney-in-Fact.

SURETY.

The above bond and surety approved this 5th day of Sept., 1933.

F. C. JACOBS
Judge of the United States District Court
for the District of Arizona. [245]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF TUESDAY, SEPTEMBER 5, 1933

Come now the Defendants by their counsel, Messrs. Baker and Whitney, and present to the Court their bond on appeal, executed on the 5th day of September, 1933, in the sum of Forty-five Hundred Dollars ($4500.00), with Pacific Indemnity Company, a corporation, as surety thereon, and

IT IS ORDERED that said bond be and the same is hereby accepted and approved. [248]

[Title of Court and Cause—Consolidated Cases.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the above entitled Court and to Messrs. Samuel White and F. L. Snell, Jr., attorneys for Plaintiff and Appellee:

You and each of you are hereby notified that the transcript of record to be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, in connection with the appeal heretofore filed

and allowed in the above entitled cause, shall contain properly certified copies of the following papers, proceedings and documents, which defendants and appellants aver to be necessary to a determination of said cause in said appellate court, to-wit:

1. The summons and return in said cause;
2. The complaint;
3. The amended answer to the complaint;
4. The special findings of fact and conclusions of law requested by the plaintiff;
5. The stipulation waiving a jury trial;
6. Defendants' proposed amendments and additions to plaintiff's requested special findings of fact and conclusions of law;
7. Special findings of fact and conclusions of law requested by defendants; [249]
8. Special findings of fact and conclusions of law made and adopted by the Court;
9. Stipulation for the incorporation by reference in the special findings of fact adopted by the Court of Exhibit "B" annexed to the complaint;
10. The judgment;
11. Plaintiff's memorandum of costs and disbursements, together with notice of application to tax costs;
12. Defendants' exceptions to plaintiff's memorandum of costs and disbursements;
13. All minute entries of the Clerk;
14. The bill of exceptions;
15. The petition for appeal;
16. The assignments of error;

17. The order allowing appeal and fixing amount of costs and/or supersedeas bond;

18. The supersedeas and appeal bond, and approval thereof;

19. The citation on appeal;

20. This praecipe;

21. Clerk's certificate.

Dated this 6th day of September, 1933.

BAKER & WHITNEY,
CHALMERS, FENNEMORE & NAIRN,
JAMES E. LYONS,
GERALD E. DUFFY,
BURTON MASON,
Attorneys for Defendants and Appellants.

Received copy of the within Praecipe this 6th day of September, 1933.

SAMUEL WHITE,
F. L. SNELL, JR.,
ELLIOTT & SNELL,
Attorneys for Plaintiff.

[Endorsed]: Filed Sep. 6, 1933. [250]

[Title of Court and Cause—Consolidated Cases.]

ORDER ENLARGING TIME FOR FILING AND DOCKETING IN CIRCUIT COURT OF APPEALS.

THIS MATTER coming on this 29th day of September, 1933, and it appearing that appeal has been allowed in the above case, transferring the same to

the United States Circuit Court of Appeals for the Ninth Circuit for review; and it appearing to the satisfaction of the Court that the Clerk of the above Court will be unable to complete the preparation of the transcript of record in the above case within the thirty day period limited in the citation, and that there is good cause for enlarging and extending the time for filing and docketing the case in the said Circuit Court of Appeals;

NOW, THEREFORE, it is hereby ORDERED that the time for the filing of the record in the above case, and docketing said cause in the United States Circuit Court of Appeals for the Ninth Circuit is hereby enlarged and extended to Nov. 1, 1933.

Dated: September 29, 1933.

F. C. JACOBS,
Judge. [251]

[Endorsed]: Filed Sep. 29, 1933. [252]

[Title of Court and Cause—Consolidated Cases.]

ORDER ENLARGING TIME FOR FILING AND DOCKETING IN CIRCUIT COURT OF APPEALS.

THIS MATTER coming on this 20th day of October, 1933, and it appearing that appeal has been allowed in the above case, transferring the same to the United States Circuit Court of Appeals for the Ninth Circuit for review; and it appearing to the satisfaction of the Court that there is good cause for

enlarging and extending the time for filing and docketing the case in the said Circuit Court of Appeals;

NOW, THEREFORE, it is hereby ORDERED that the time for the filing of the record in the above case, and docketing said cause in the United States Circuit Court of Appeals for the Ninth Circuit is hereby enlarged and extended to December 1, 1933.

Dated: October 20, 1933.

F. C. JACOBS,
Judge.

[Endorsed]: Filed Oct. 20, 1933. [253]

In the United States District Court for the District of Arizona.

United States of America,
District of Arizona.—ss.

I, J. Lee Baker, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Solomon-Wickersham Company, a corporation, Plaintiff, versus Santa Maria Valley Railroad Company, a corporation, and Southern Pacific Company, a corporation, Defendants, numbered L-763-Phoenix, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 257 inclusive, contain a full, true and

correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the praecipe filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the city of Phoenix, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of $45.25 and that said sum has been paid to me by counsel for the appellant.

I further certify that the original citation issued in the said cause is hereto attached and made a part of this record.

WITNESS my hand and the Seal of the said Court this 24th day of November, 1933.

[Seal] J. LEE BAKER,
Clerk. [254]

[Title of Court and Cause—Consolidated Cases.]

CITATION ON APPEAL

To Solomon-Wickersham Company, a corporation, plaintiff above named, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, in the State of California, within thirty (30) days from the date hereof pursuant to an

appeal, and/or order allowing appeal, filed in the office of the Clerk of the United States District Court, for the District of Arizona, wherein Santa Maria Valley Railroad Company, a corporation, and Southern Pacific Company, a corporation, are appellants, and you are appellee, to show cause, if any there be, why the judgment rendered against said Santa Maria Valley Railroad Company, a corporation, and Southern Pacific Company, a corporation, appellants as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable F. C. Jacobs, Judge of the United States District Court for the District of Arizona, this 5th day of September, 1933.

[Seal] F. C. JACOBS
Judge of the United States District Court, for the District of Arizona. [255]

Service of the within Citation on Appeal, and receipt of a copy thereof is hereby admitted this 6th day of September, 1933. Service is also admitted, and receipt is acknowledged, as of this date, of copies of Petition for Appeal, Order Allowing Appeal and Fixing Amount of Cost and/or Supersedeas Bond, Assignments of Error, and Bond, all having to do with the above entitled and numbered cause.

SAMUEL WHITE
F. L. SNELL, JR.
Attorneys for Solomon-Wickersham Company plaintiff and appellee. [256]

[Endorsed]: Filed Sep. 6, 1933.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7342

SANTA MARIA VALLEY RAILROAD COMPANY, a corporation, and SOUTHERN PACIFIC COMPANY, a corporation,

Defendants and Appellants,

vs.

SOLOMON-WICKERSHAM COMPANY, a corporation,

Plaintiff and Appellee.

STATEMENT BY APPELLANTS OF PARTS OF RECORD NECESSARY TO BE PRINTED.

To HONORABLE PAUL P. O'BRIEN, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and to MESSRS. SAMUEL WHITE and F. L. SNELL, JR., Attorneys for plaintiff and appellee:

I.

Defendants and appellants herein state that in the review of the above cause by the United States Circuit Court of Appeals for the Ninth Circuit they intend to rely upon alleged errors committed by the trial court as follows, to wit:

1. Errors of the trial court in the admission and/or exclusion of evidence upon the trial of said cause.

2. Errors of the trial court in its findings of fact and conclusions of law.
3. Errors of the trial court in refusing to make findings of fact and conclusions of law requested by the defendants and appellants.
4. Errors of the trial court in rendering judgment in favor of the plaintiff and appellee and against the defendants and appellants.

II.

Defendants and appellants also state that for the proper consideration of said alleged errors they think it necessary to print the following parts and portions of the transcript of record certified and filed by the Clerk of the United States District Court for Arizona with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, to wit:

All of said transcript of record, save and except the following:

The minute order of May 29, 1933, appearing upon page 30 of said transcript;

The order extending the defendants' time to answer, dated December 6, 1930, appearing on page 33 of said transcript;

The minute entry of December 22, 1930, appearing on page 34 of said transcript;

The minute entries of March 23, 1931, December 28, 1931, and February 15, 1932, appearing on pages 36, 37, and 38, respectively, of said transcript;

Defendants' proposed findings of fact and conclusions of law, appearing at pages 76 to 86, inclusive, of said transcript;

The findings of fact and conclusions of law made and adopted by the trial court, appearing on pages 92 to 99, inclusive, of said transcript;

The judgment in said cause, appearing on pages 100 and 101 of said transcript;

The power of attorney issued by Pacific Indemnity Company, surety upon the bond on appeal, to its agent and attorney in fact for the State of Arizona, appearing at page 246 of said transcript.

Dated at San Francisco, California, this 29th day of November, 1933.

BAKER & WHITNEY
JAMES E. LYONS
BURTON MASON
Attorneys for Defendants and Appellants.

[Endorsed]: Service of the within Statement by Appellants of Parts of Record Necessary to be Printed is admitted this 4th day of Dec., 1933.

SAMUEL WHITE,
F. L. SNELL, JR.,
Attorneys for Plaintiff and Appellee.

[Endorsed]: Filed Dec. 6, 1933. Paul P. O'Brien, Clerk.

[Endorsed]: No. 7342. United States Circuit Court of Appeals for the Ninth Circuit. Santa Maria Valley Railroad Company, a corporation, and Southern Pacific Company, a corporation, Appellants, vs. Solomon-Wickersham Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed November 27, 1933.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7342

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SANTA MARIA VALLEY RAILROAD COMPANY, et al.,
Defendants and Appellants,
vs.
SOLOMON-WICKERSHAM COMPANY,
Plaintiff and Appellee.

APPELLANTS' OPENING BRIEF.

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FILED
SEP 27 1934
PAUL P. O'BRIEN,

Subject Index

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No. 7342

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SANTA MARIA VALLEY RAILROAD COMPANY, et al.,
Defendants and Appellants.

vs.

SOLOMON-WICKERSHAM COMPANY,
Plaintiff and Appellee.

APPELLANTS' OPENING BRIEF.

STATEMENT OF THE CASE.

This appeal is prosecuted to reverse a judgment rendered by the United States District Court for Arizona, in an action at law brought in that Court in which the appellants were defendants and the appellee was plaintiff. This case is quite similar, in many respects, to No. 7341, *El Paso & Southwestern R. Co., et al. v. Phelps-Dodge Mere. Co.*, and No. 7343, *Sou. Pac. Co. v. Baffert, et al.*, now pending before this Court, in which appeals have been taken from similar adverse judgments of the same trial Court.

During the period between April 11, 1921, and December 10, 1923, plaintiff,[1] an Arizona corporation,

1. Throughout this brief the parties are designated in the same manner as in the trial Court.

received at Bowie, Arizona, some 31 carload shipments of sugar, which had moved from various points of origin in California, upon which freight charges were assessed at the contemporaneous commodity rates (R. 37-39).

On August 14, 1923, plaintiff, as complainant, filed a complaint with the Interstate Commerce Commission in which it alleged that defendants' rates on sugar, in carloads, from various points in California to Bowie were, and in future would be, unreasonable, in violation of Section 1 of the Interstate Commerce Act. The Commission was asked to determine what would have been or would be reasonable rates in lieu of those attacked and to award reparation, both upon past shipments, and those moving *pendente lite*. On March 12, 1928, the Commission rendered its final decision, covering plaintiff's complaint as well as a number of others consolidated therewith, in which it declared, among other things, that the rates attacked had been unreasonable and that reparation was due:

> *Traffic Bureau, Phoenix Chamber of Commerce, et al. v. A. T. & S. F. Ry. Co., et al.* (1928), 140 I. C. C. 171.

For convenience, this decision will be referred to herein as the *"Third Phoenix Case"*, adopting the designation used in two recent cases before this Court which arose out of the same decision:

> *A. T. & S. F. Ry. Co. v. Arizona Grocery Company*[2] (1931), 49 F. (2d) 563; (*affirmed,*

2. For convenience, this case is referred to hereinafter as the *"Arizona Case"*.

1932), 284 U. S. 370;

Arizona Wholesale Grocery Co. v. S. P. Co.[3] (1934), 68 F. (2d) 601.

A copy of the opinion and order in the *Third Phoenix Case* is annexed as Exhibit A to the complaint (R. 8-36, inclusive). A copy was also introduced in evidence at the trial as Plaintiff's Exhibit 1 (R. 83).

Following the decision in the *Third Phoenix Case,* and as directed in the concluding portion thereof, plaintiff compiled and submitted to the Commission a tabular statement (known as a "Rule V Statement") setting forth essential information as to the shipments upon which reparation was claimed. In due course, the Commission entered a supplementary order (April 14, 1930), authorizing payment of reparation to the plaintiff (R. 41-42). A copy of the Rule V statement appears as Exhibit B to the complaint (R. 37-39), and was introduced as Plaintiff's Exhibit 3 at the trial (R. 84).

Defendants declined to comply with the reparation order (R. 6, 46); and thereupon the instant case was commenced, in the United States District Court for Arizona, pursuant to the provisions of Section 16 (2) of the Interstate Commerce Act (49 U. S. C. 16-2).

The primary (but not the *only*) defense urged in this case was and is the same as that successfully maintained in the *Arizona* and *Wholesale Grocery Cases,* supra: namely, that the rates and charges under

3. For convenience, this case is referred to hereinafter as the *"Wholesale Grocery Case".*

attack conformed to a prior formal declaration by the Commission dealing with the same transportation services, and the attempted award was therefore beyond the Commission's power. In order that defendants' contentions in this behalf may be more readily understood, it is desirable at this point to review briefly the evolution of the rates which, as applied upon plaintiff's shipments, were afterwards found unreasonable by the Commission in the *Third Case.*

On April 15, 1914, the Arizona Corporation Commission filed a complaint with the Interstate Commerce Commission attacking as unreasonable the rates on sugar and syrup in straight and/or mixed carloads, from producing points in California to all destinations in Arizona. The proceeding is reported as Docket No. 6806, *Arizona Corporation Commission v. A. T. & S. F. Ry. Co., et al.* (1915), 34 I. C. C. 158. A copy of the opinion and order was received in evidence at the trial, as Defendants' Exhibit A (R. 95-105). While Docket 6806 was pending, but before its final submission, the carriers voluntarily reduced their rates from substantially all California producing points to all important destinations in Arizona, including Bowie. These reductions included the publication of lower rates than those previously in effect, and the initiation of rates upon still lower levels, subject to an increased minimum carload weight of 60,000 pounds (the minimum under the previous rates was 36,000 pounds). As thus established, the reduced rate, subject to the 60,000-pound minimum, became 55 cents[4]

4. Unless otherwise stated, all rates shown herein are in amounts per hundred pounds.

to Bowie (R. 100; see, also, Defendants' Exhibit E: R. 167-168). The Commission, in deciding Docket 6806, took notice of these reductions, and concluded (R. 103) that the rates attacked by the complaint had not been shown unreasonable to any greater extent than the amount of the reductions; i. e., that the rates as thus reduced were reasonable for the future. In conformity with that finding, the rates to Bowie, as made effective during the pendency of Docket 6806, were continued in effect without any change until June 25, 1918.

In the meantime, on December 29, 1917, possession, control and operation of the railroad properties of the defendant carriers was assumed by the President, acting through the Director-General of Railroads as head of the United States Railroad Administration, all as provided by the *Federal Control Act:* 39 Stat. 619, 645; 40 Stat. 451, 1733 (R. 173). On June 25, 1918, pursuant to General Order No. 28 of the Director-General, these rates, together with all other rates generally throughout the United States, were advanced 25 per cent. It was later determined that a flat advance should have been made in the sugar rates, instead of the percentage increase; and on November 25, 1919, the 25-per cent advance was superseded by an advance of 22 cents (Defendants' Exhibits E, H, and I: R. 167-168, 173-180). This change was likewise pursuant to order of the Director-General.

On March 1, 1920, the defendants resumed possession, control and operation of their properties, upon the termination of Federal Control (*Transportation*

Act 1920, 41 Stat. 456). The rate in effect at that time (77 cents), subject to the 60,000-pound minimum, which was the rate in effect on May 25, 1915 (55 cents), subject only to the changes made by the Director-General during Federal Control, continued in effect without any change until August 26, 1920.

On that date the rate to Bowie was again advanced 25 per cent (to 96½ cents), in conformity with the decision of the Commission in:

Increased Rates 1920 (*Ex parte 74*), 58 I. C. C. 220.

The changes made on that date applied to all rates throughout the country, both on sugar and other commodities generally, although the percentages of advance were not uniform.

On July 27, 1921, the rate was voluntarily reduced from 96½ to 96 cents. On July 1, 1922, it was reduced 10 per cent, in accordance with the recommendations made by the Commission in:

Reduced Rates 1922, 68 I. C. C. 676.

This change was similar to the advances of 1918 and 1920, in that it was general in character, practically all rates throughout the country having been affected thereby. It resulted in a rate of 86½ cents to Bowie. All of the aforementioned changes are shown in detail on Defendants' Exhibit E, which recites the complete history of the rates (R. 167-168).

As shown by the Rule V statement, the rates of 96½ cents, 96 cents, and 86½ cents, which were successively in effect during the period between August 26, 1920, and January 12, 1924, were the rates charged

on the shipments upon which the plaintiff seeks reparation. The rates found reasonable for reparation purpose, in lieu of those charged, are: 93 cents from northern California points, and 83 cents from southern California points, *prior* to July 1, 1922; 84 cents from northern California, and 75 cents from southern California, on and after that date (R. 25-26).

The changes in the rate here involved, during the period from June 27, 1921, to and including January 11, 1924, were precisely the same as those made in the rate from the same origins to Phoenix during the same period, as recited in the opinions of the Supreme Court (284 U. S., pp. 381, 382) and of this Court (49 F. (2d), p. 565) in the *Arizona Case*.

The instant case was tried by the Court sitting without a jury, a trial by jury having been duly waived in writing (R. 51-52). At the trial defendants advanced the following contentions:

1. The rates on sugar from the points of origin of plaintiff's shipments to Bowie were approved, and declared to be reasonable, by the Commission, by the decision in Docket 6806.

2. The rates approved as reasonable in Docket 6806 were continued in effect thereafter, throughout the period of movement of the shipments upon which reparation is sought, subject to certain general changes, including two or more advances, and one reduction, authorized and/or required by the United States, acting through the Director-General and the Commission, and to one incidental voluntary reduction by defendants.

3. The rates assessed upon the shipments upon which reparation is sought were in all instances equal to, or less than, the rates approved as reasonable by the Commission in Docket 6806, as modified in response to the above-mentioned orders or recommendations of the Director-General and the Commission.

4. The Commission was without jurisdiction to make any valid order for the payment of reparation upon plaintiff's shipments moving under rates equal to or less than those approved in Docket 6806, as subsequently modified.

5. Apart from the question of the Commission's jurisdiction, the finding in the *Third Phoenix Case,* upon which the reparation order is founded, is legally inadequate to sustain that order, and affords no satisfactory evidence that the rates and charges against which reparation is sought were unreasonable. The balance of the plaintiff's evidentiary showing is either incompetent, or otherwise inadequate to support the complaint.

6. The defendants' affirmative showing demonstrates that the rates charged were not unreasonable. This showing is ample to overcome whatever *prima facie* evidentiary value may reside in plaintiff's evidence.

On the other hand, plaintiff contended that, even if the Commission had, in Docket 6806, approved as reasonable the rates then before it, the subsequent

changes so modified the rates as to destroy the effect of the Commission's prior approval, and thus rendered the rates as charged subject to the Commission's reparation jurisdiction; that the Commission's finding with respect to reparation, in the *Third Phoenix Case,* was jurisdictionally made and therefore valid, and that the reparation order in suit, which is founded thereon, is likewise valid; that the finding and order constitute *prima facie* evidence of the unreasonableness of the rates charged, and of the fact and amount of the damage alleged to have been incurred by plaintiff; that this *prima facie* showing was further supported by the supplementary testimony offered by plaintiff; and that defendants' showing failed entirely to overcome plaintiff's *prima facie* case.

Although the trial Court rendered no formal opinion, it apparently adopted the views advanced by plaintiff. After making special findings of fact and conclusions of law, largely as proposed by plaintiff, and rejecting those requested by defendants, it rendered judgment as demanded in the complaint, including interest, and an allowance of 20 per cent of the principal plus interest, on account of attorney's fees. The case now comes to this Court upon appeal from that judgment.

ASSIGNMENTS OF ERROR.

The errors asserted and relied upon by the defendants and appellants are as follows (R. 228-263):

1. The Court erred in overruling defendants' timely objection to the admission in evidence of Plaintiff's

Exhibit 4, and in receiving said Exhibit 4 in evidence (Assignment of Error No. 1).

2. The Court erred in failing to find and conclude that the rates on sugar, in carloads, from the California points of origin of plaintiff's shipments to Bowie, were approved as just and reasonable by the Commission, in its decision in Docket 6806; that the rates so approved were continued in effect, subject only to intervening modifications authorized and/or required by the United States, acting through the Director-General of Railroads, as the agent of the President, and through said Commission, and to a voluntary reduction made by defendants, following their approval by the Commission, and throughout the period of movement of plaintiff's shipments upon which reparation is sought; and that the rates charged and applied upon plaintiff's shipments were in all instances equal to, or less than, those approved and declared to be reasonable by the Commission in said Docket 6806, as modified only by the intervening authorized general modifications just referred to (Assignments of Error Nos. 9, 10, 11, 12, and 27).

3. The Court erred in failing to find and conclude that the purported order awarding reparation to the plaintiff, made and issued by the Commission on April 14, 1930, upon which the plaintiff's suit is founded, was and is void and of no effect, for the reason that said Commission was and is without jurisdiction under the law to make said order, or any order, purporting to award reparation for the collection of charges based upon rates duly published and maintained by

defendants pursuant to and in conformity with previous lawful, valid, formal findings; and in finding and concluding that said purported order for the payment of reparation was and is legal, valid, and binding, and within the jurisdiction conferred by law upon said Commission (Assignments of Error Nos. 24, 28, and 32).

4. The Court erred in finding and concluding that the rates and charges assessed upon plaintiff's said shipments were unreasonable, and in violation of the Interstate Commerce Act; and in failing to find that, as measured by rates approved or prescribed by the Commission itself, and thus conclusively established as reasonable from and to closely related points of origin and destination, said rates as charged were in all respects just and reasonable, and in full conformity with all requirements of said Act (Assignments of Error Nos. 13, 14, 15, 16, 17, 20, 21, 25, 29, and 32).

5. The Court erred in failing to find and conclude that plaintiff has failed entirely to establish the cause of action alleged in its complaint, or any cause of action whatever, against defendants or either of them; and in failing to grant defendants' motion for a nonsuit against plaintiff, and for the entry of judgment in favor of defendants, duly made at the conclusion of plaintiff's testimony in chief; and in failing to grant defendants' further motion for judgment in favor of defendants and against the plaintiff, upon the pleadings and the evidence, duly made at the conclusion of the taking of the testimony at the trial (Assignments of Error Nos. 2, 3, and 29).

6. The Court erred in finding that plaintiff has been damaged, by reason of the refusal of defendants to pay reparation to plaintiff as awarded by the Commission, and in concluding that plaintiff is entitled to judgment against defendants, and that defendants are indebted to the plaintiff as follows: the defendants, Southern Pacific Company and Santa Maria Valley Railroad Company, jointly and severally, in the sum of $81.10, together with interest amounting to the sum of $46.89, together with attorney's fees amounting to the sum of $25.59; and the defendant, Southern Pacific Company, severally, in the amount of $1723.01, together with interest amounting to the sum of $1136.24, together with attorney's fees amounting to the sum of $571.85; together with other lawful costs; and in refusing to find and conclude that defendants are entitled to judgment in said cause, and that plaintiff take nothing by its action herein (Assignments of Error Nos. 22, 26, 30).

7. The Court erred in finding that plaintiff was compelled to employ an attorney to prosecute and maintain its said action, and that 20 per cent of the total amount due, including principal and interest, is reasonable to be allowed as plaintiff's attorney's fees; and in refusing to find and conclude that plaintiff is not entitled to recover any amount whatsoever, as and for fees of its attorneys in this cause (Assignments of Error Nos. 5, 23, and 30).

8. The Court erred in rendering and entering judgment, upon the facts as found by the Court, in favor of plaintiff and against defendants, and in refusing to

render and enter judgment upon the facts found, in favor of defendants; and erred further in failing to render and enter judgment in favor of defendants and against plaintiff, predicated upon the findings of fact and conclusions of law proposed and requested by defendants, and upon the undisputed facts appearing in the evidence, upon which said proposed findings and conclusions of defendant were and are predicated (Assignments of Error Nos. 31 and 32).

BRIEF OF ARGUMENT.

I. The Commission was without jurisdiction to make the finding and order upon which the instant suit is based.

This suit cannot be maintained except upon the basis of a valid reparation finding and order by the Commission.

Texas and Pacific Ry. Co. v. Abilene Cotton Oil Co. (1907), 204 U. S. 426;

Meeker v. Lehigh Valley R. Co. (1915), 236 U. S. 412;

Lewis-Simas-Jones v. S. P. Co. (1931), 283 U. S. 654.

1. *The Commission, by its decision in Docket 6806, approved as reasonable the rates on sugar in carloads from and to the points involved in this case.*

The finding in Docket 6806 has already been referred to and, in effect, construed by this Court as an approval of the rates there considered.

Arizona Wholesale Grocery Co. v. S. P. Co. (1934), 68 F. (2d) 601.

Findings made by the Commission in other cases, similar in language and import to that made in Docket 6806, have been construed both as approvals of the rates charged, and as findings of reasonableness.

Arizona Wholesale Grocery Co. v. S. P. Co., supra;

U. S. v. New River Co. (1924), 265 U. S. 533 (537, 541);

U. S. v. Illinois Central R. Co. (1924), 263 U. S. 515 (519, 520, 524);

Edward Hines Trustees v. U. S. (1923), 263 U. S. 143 (146);

Turner Lumber Co. v. C. M. & St. P. Ry. Co. (1926), 271 U. S. 259 (261, 263);

Alton R. Co. v. U. S. (1932), 287 U. S. 229 (231, 237);

Hohenberg v. L. & N. R. Co. (C. C. A. 5th, 1931), 46 F. (2d) 952 (954).

The essential issue presented in Docket 6806, and therefore necessarily decided therein, was whether the rates on sugar from California origins to Arizona destinations were and in future would be reasonable.

Interstate Commerce Commission v. Stickney (1909), 215 U. S. 98 (105);

A. T. & S. F. Ry. Co. v. U. S. (1914), 232 U. S. 199 (221);

Defendants' Exhibit A (R. 95-97, 100, 101).

2. *The rates charged on the shipments here involved were in all instances equal to or less than the rate ap-*

proved in Docket 6806, as thereafter modified by the authorized general changes.

Plaintiff's Exhibit 1 (R. 12-16);

Defendants' Exhibit E (R. 167-168).

The changes made during the period of Federal Control were accomplished in response to orders of the Director-General, then exercising powers conferred by the Federal Control Act, and acting as the authorized agent of the President.

Northern Pacific Ry. Co. v. North Dakota (1919), 250 U. S. 135 (148);

Mo. Pac. R. Co. v. Ault (1921), 256 U. S. 554 (557);

Dupont Co. v. Davis (1924), 264 U. S. 456 (462).

The general changes of 1920 and 1922 were in response to decisions of the Commission itself.

Increased Rates 1920, 58 I. C. C. 220;

Reduced Rates 1922, 68 I. C. C. 676.

3. *Under the rule of the controlling decisions, the reparation order in suit is void and unenforceable.*

Arizona Grocery Co. v. A. T. & S. F. Ry. Co. (1932), 284 U. S. 370;

Arizona Wholesale Grocery Co. v. S. P. Co., supra.

4. *The decision of the Circuit Court of Appeals for the Fifth Circuit in the Eagle Cotton Oil Case is of no value as an authority to support the trial Court's decision.*

(a) *The intervening general changes did not operate to deprive the rates charged of their status as Commission-approved rates.*

The general changes of 1918, 1920, and 1922, were of precisely the same character.

Brimstone R. & C. Co. v. U. S. (1924), 276 U. S. 104.

In the *Arizona Case* the Supreme Court and this Court in effect held that the intervening change of 1922 did not operate to deprive the rates there under consideration of their Commission-made status, although those rates had been prescribed prior to 1922 and had been modified by that general change. The decision in the *Eagle Case:*

Eagle Cotton Oil Co. v. A. G. S. R. Co. (1931), 51 F. (2d) 443,

to the extent that it expresses a contrary theory, is in conflict with the *Arizona Case* and therefore not a controlling precedent. It is also in conflict with this Court's decision in the *Wholesale Grocery Case,* and the decision of the United States District Court for Arizona (three Judges sitting), in

E. P. & S. W. R. Co. v. Arizona Corporation Commission (1931), 51 F. (2d) 573.

(b) *The effectiveness of the Commission's finding in Docket 6806, approving the rates, was not destroyed by the lapse of the time intervening prior to the charging of the assailed rates.*

The decision in the *Eagle Case* proceeds upon the theory that an order of the Commission made in 1915 expired in two years. Defendants here rely upon a

finding made by the Commission in 1915, in connection with which no *order for the future* was entered. The findings of the Commission are entirely distinct from its orders.

Interstate Commerce Act, Sections 14, 15, 16 (1);

U. S. v. A. B. & C. R. Co. (1931), 282 U. S. 522 (527);

Brady v. Interstate Commerce Commission (1930), 43 F. (2d) 847 (850) (affirmed: 283 U. S. 804);

American Sugar Refining Co. v. D. L. & W. R. Co. (C. C. A. 3rd, 1913), 207 Fed. 733 (740-741);

C. B. & Q. R. Co. v. Merriam (C. C. A. 8th, 1922), 297 Fed. 1 (3-5).

The two-year limitation did not affect the Commission's findings made prior to 1920.

Southern Pacific Co. v. Interstate Commerce Commission (1911), 219 U. S. 433 (452);

Southern Pacific Terminal Co. v. Interstate Commerce Commission (1911), 219 U. S. 498 (515).

Findings of the Commission, considered apart from its orders, themselves possess sufficient force to constitute a determination of the matters with which they deal.

Western Paper Makers' Chemical Co. v. U. S. (1926), 271 U. S. 268 (270);

Virginian R. Co. v. U. S. (1926), 272 U. S. 658 (665);

Owensboro Wheel Co. v. Director General (1922), 69 I. C. C. 503 (506);
Fels & Co. v. Penn. R. Co. (1912), 23 I. C. C. 483 (486-487).

The determination of the reasonableness of a rate *for the future* is conclusive, until thereafter changed.

Interstate Commerce Commission v. Union Pacific R. Co. (1912), 222 U. S. 541 (547, 548);
Western Paper Makers' Chemical Co. v. U. S., supra;
A. T. & S. F. Ry. Co. v. U. S. (1914), 234 U. S. 294 (311);
Virginian R. Co. v. U. S., supra.

The decision in the *Arizona Case* follows and affirms that principle, but it appears to have been overlooked, if not entirely disregarded by the Circuit Court in the *Eagle Case.*

The denial of certiorari in the *Eagle Case* imports no expression of opinion by the Supreme Court on the merits, and does not operate at all as an affirmance.

U. S. v. Carver (1921), 260 U. S. 482 (490);
Hamilton Shoe Co. v. Wolf Bros. (1916), 240 U. S. 251 (258).

II. The rates and charges assessed upon the shipments upon which reparation is claimed were not unreasonable.

1. *The substantive issue of the reasonableness of the rates as charged was properly presented for determination by the trial Court. That determination may be reviewed by this Court upon this appeal.*

The issue of the reasonableness of the rates is duly presented by the pleadings.

Complaint, Paragraphs III, VIII (R. 3, 6);
Amended Answer, Paragraphs II, VII (R. 46-47, 50).

In this suit the finding and order of the Commission are merely *prima facie* evidence, and are not conclusive upon the Court or the defendants.

Interstate Commerce Act, Section 16 (2);
Meeker v. Lehigh Valley R. Co., supra;
Spiller v. A. T. & S. F. Ry. Co. (1920), 253 U. S. 117 (131-132);
Lewis-Simas-Jones v. S. P. Co., supra;
B. & O. R. Co. v. Brady (1933), 288 U. S. 448 (457, 458);
C. N. O. & T. P. Ry. Co. v. I. C. C. (1896), 162 U. S. 184 (196);
Pittsburgh & W. V. Ry. Co. v. U. S. (1924), 6 F. (2d) 646 (648);
Brady v. I. C. C., supra;
Blair v. Cleveland, C. C. & St. L. Ry. Co. (1931), 45 F. (2d) 792;
Atlantic Coast Line R. Co. v. Smith Bros. (C. C. A. 5th, 1933), 63 F. (2d) 747 (748) (certiorari *denied:* 289 U. S. 761);
Southern Ry. Co. v. Eichler (C. C. A. 8th, 1932), 56 F. (2d) 1010 (1018).

The question was properly saved, for review upon this appeal, by exceptions to rulings of the trial Court, denying defendants' proposed findings and adopting those proposed by plaintiff, and denying defendants'

motion for a nonsuit and for judgment on the pleadings and the evidence (R. 94-95, 186, 207, 215, 220).

Maryland Casualty Co. v. Jones (1929), 279 U. S. 792;

Fleischmann Co. v. U. S. (1926), 270 U. S. 349 (356);

Southern Ry. Co. v. Eichler, supra.

2. *Plaintiff's evidence is wholly inadequate, as a matter of law, to support the trial Court's finding and conclusion that the rates and charges in issue were unreasonable.*

(a) *The Commission's finding in the Third Phoenix Case is partially invalid, under various Court decisions, and therefore incompetent and inconsistent in its entirety.*

(1) *The reparation finding is invalid and incompetent because predicated upon a demonstrated error of law.*

Arizona Grocery Co. v. A. T. & S. F. Ry. Co., supra;

Arizona Wholesale Grocery Co. v. S. P. Co., supra;

T. F. Miller Co. v. A. T. & S. F. Ry. Co. (U. S. D. C. Arizona, April 15, 1933).

(2) *Because of the discriminations resulting from its enforcement, the reparation finding in suit is invalid, and of no force as evidence to sustain plaintiff's contentions.*

Discriminations may be accomplished just as effectively by the refund of a portion of the charges col-

lected for one of two equivalent or similar services, but not the other, as by the initial charging of different amounts.

Wight v. U. S. (1897), 167 U. S. 512;
Penn. R. Co. v. International Coal Co. (1913), 230 U. S. 184;
Mitchell Coal Co. v. Penn. R. Co. (1913), 230 U. S. 247;
Texas and Pacific Ry. Co. v. Abilene Cotton Oil Co., supra;
Phillips v. Grand Trunk Ry. Co. (1915), 236 U. S. 662;
Union Pac. Ry. Co. v. Goodridge (1893), 149 U. S. 680.

The enforcement of the reparation finding and order here in suit would create again discriminations exactly similar to those previously condemned, by the Commission itself, in decisions and orders operating for the future, and would thus run counter to the basic purpose of the Interstate Commerce Act itself.

Phoenix Chamber of Commerce v. Director General (1921), 62 I. C. C. 412;
Douglas Chamber of Commerce v. A. T. & S. F. Ry. Co. (1921), 64 I. C. C. 405;
Graham, etc., Traffic Ass'n. v. A. E. R. Co. (1923), 81 I. C. C. 134;
N. Y., N. H. & H. R. Co. v. I. C. C. (1906), 200 U. S. 361 (391);
United States v. Union Stock Yard (1912), 226 U. S. 286 (307, 309).

Discriminations thus declared to be unlawful would not become clothed with legality simply because due to

the enforcement of a quasi-judicial order by the Commission, rather than the carriers' voluntary acts. "What the carrier may not lawfully do, the Commission may not compel".

Texas and Pacific Ry. Co. v. U. S. (1933), 289 U. S. 627 (637);

S. P. Co. v. Interstate Commerce Commission, supra;

Interstate Commerce Commission v. Diffenbaugh (1911), 222 U. S. 42 (46);

Ellis v. Interstate Commerce Commission (1916), 237 U. S. 434 (445);

U. S. v. Illinois Central R. Co., supra;

Anchor Coal Co. v. U. S. (1927); 25 F. (2d) 462 (471-472).

(3) *The acceptance of the reparation finding as valid prima facie evidence fails to recognize or give due effect to the controlling decisions in the Arizona and Wholesale Grocery Cases.*

The decision in the *Arizona Case* determined that the 96½-cent rate to Phoenix prescribed in the *First Phoenix Case* in 1921 was the conclusive measure of a reasonable rate to Phoenix, as long as the Commission's order continued in effect.

Arizona Grocery Co. v. A. T. & S. F. Ry. Co., supra (284 U. S., at p. 383).

The decision in the *Wholesale Grocery Case* applied the same principle to the rates to Globe and Safford approved by the Commission in the *Graham Case.* The same principle applies in the case of the rates to

Clarkdale and Douglas, which were also approved by the Commission. The rates thus prescribed or approved constituted conclusive measures of reasonable rates for the transportation services to Bowie, which should have been followed by the trial Court.

(b) *The showing attempted by plaintiff, apart from the finding and order in the Third Phoenix Case, was largely incompetent and in any event wholly inadequate to support the trial Court's findings and judgment.*

Plaintiff's Exhibit 4 was incompetent because not prepared by the witness through whom it was introduced (R. 85). In any event, it was nothing but a reproduction of a part of the opinion in the *Third Phoenix Case* (R. 22, 25, 26), in evidence as Plaintiff's Exhibit 1.

The balance of plaintiff's showing, consisting of two reports of the Commission, if of any value at all, supports findings and conclusions contrary to those of the trial Court.

> *Arizona Corporation Commission v. A. E. R. Co.* (1926), 113 I. C. C. 52 (on rehearing, 1928); 142 I. C. C. 61.

3. *Defendants' evidence demonstrates conclusively that the rates as charged were not unreasonable.*

Defendants' showing compares the rates charged with the prescribed or approved rates to Phoenix, Globe, Safford, and Douglas.

> *Defendants' Exhibits B, C, and D* (R. 106-165); *Defendants' Exhibits F and G* (R. 169-172).

These comparisons with Commission-made or approved rates constitute the best possible tests of the reasonableness of the rates charged.

Blackman, et al. v. A. C. & Y. R. Co., et al. (1918), 49 I. C. C. 649 (654);

Montgomery v. A. & S. Ry. Co. et al. (1928), 147 I. C. C. 415 (418);

Federated Metals Corp. v. Central R. R. Co. (1927), 126 I. C. C. 703 (709);

Illinois Electric Co. v. C. B. & Q. R. Co. (1928), 140 I. C. C. 63 (65);

Western Paper Makers' Chemical Co. v. U. S., supra;

Montrose Oil Refining Co. v. St. L. & S. F. Ry. Co. (1927), 25 F. (2d) 750 (752, 753).

These comparisons, being with rates conclusively established as just and reasonable, afford evidence ample to overcome any *prima facie* case made out in plaintiff's favor by the reparation finding and order.

B. & O. R. Co. v. Brady, supra;

Atlantic Coast Line R. Co. v. Smith Bros., supra;

Blair v. C. C. C. & St. L. Ry. Co., supra;

Southern Ry. Co. v. Eichler, supra.

III. The trial Court erred in its award of attorney's fees to plaintiff.

In the complaint, plaintiff demanded, as a reasonable attorney fee, $500.00: Complaint, Paragraph IX (R. 7). The trial Court awarded a total attorney's fee of $597.44 (R. 216-217, 221-224). The award in

excess of the amount alleged to be reasonable, and demanded by the complaint, is erroneous.

Skym v. Weske Consolidated Co. (Cal. 1896), 47 Pac. 116 (118);

Wellington v. Midwest Ins. Co. (1923), 112 Kan. 687, 212 Pac. 892;

Brought v. Cherokee Nation (C. C. A. 8th, 1904), 129 Fed. 192 (195);

Wise v. Wakefield (1897), 118 Cal. 107;

Logan County v. Childress (1922), 196 Ky. 1, 243 S. W. 1038;

Mountain Timber Co. v. Case (1913), 65 Ore. 417, 133 Pac. 92.

ARGUMENT.

FOREWORD.

Two major questions are presented by this appeal.

First, there is the initial question of law, whether the trial Court erred: (1) in failing to make findings, based upon defendants' undisputed showing, setting forth (a) the Commission's prior approval of the rates on sugar from California points of origin to Bowie, (b) the subsequent maintenance by the defendant carriers of rates equal to or less than those so approved, subject only to general modifications initiated, required or recommended by the Director-General of Railroads and the Commission, and to one incidental voluntary reduction, and (c) the application and assessment of such rates upon the shipments upon which reparation is sought; and (2) in failing to conclude

therefrom that the reparation finding and order in suit were and are in excess of the Commission's lawful jurisdiction, and therefore void.

Second, there is the question, also one of law, whether, even if it be held that the Commission was possessed of *abstract* jurisdiction to award reparation upon the shipments in question, the trial Court erred: (1) in failing to find and conclude that the reparation finding relied upon by plaintiff is deprived of value as *prima facie* evidence, by reason of decisions of the Supreme Court, of this Court, and of the trial Court itself, involving the same finding; and (2) in finding and concluding that said finding, as supplemented by other testimony offered by plaintiff, is sufficient to overcome the evidentiary showing of the reasonableness of the rates charged, submitted by defendants.

I.

THE COMMISSION WAS WITHOUT JURISDICTION TO MAKE THE FINDING AND ORDER UPON WHICH THE INSTANT SUIT IS BASED.

In this argument we shall first discuss the primary question, whether the reparation finding and order in suit are void, because in excess of the jurisdiction conferred upon the Commission. It is clear that if they are void, the action has no legal basis at all, and it becomes unnecessary to review the second issue outlined in the preceding statement. Controlling decisions of the Supreme Court have definitely established that a suit at law for the recovery of reparation

(damages) for the charging of alleged unreasonable interstate rates cannot be maintained in any Court, unless the plaintiff has first made complaint before the Commission, and secured definite findings and a formal order declaring the fact and amount of the reparation due, and authorizing its payment.

Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co. (1907), 204 U. S. 426;

Meeker v. Lehigh Valley R. Co. (1915), 236 U. S. 412;

Lewis-Simas-Jones Co. v. S. P. Co. (1931), 283 U. S. 654.

The defendants' contention, upon the primary issue, is simply that, under the principles laid down in the *Arizona Case* and the *Wholesale Grocery Case,* as applied to the undisputed facts of the instant case, the finding and order are in excess of the Commission's jurisdiction, and therefore void. In the *Arizona Case,* this Court and the Supreme Court decided in effect, that when the Commission, after hearing, has declared what is the maximum reasonable rate thereafter to be charged by a carrier, it may not subsequently subject a carrier which conformed to that declaration to the payment of reparation measured by a rate which the Commission later holds should have been established: in other words, that carriers cannot be held in damages for having charged rates conforming to prior formal declarations of the Commission. In the *Wholesale Grocery Case,* this Court held that the principle of the *Arizona Case* applies equally to situations where the rates as charged are equal to, or less than, those previously *approved* by the Commission.

1. **The Commission, by its decision in Docket 6806, approved as reasonable the rates on sugar, in carloads, from and to the points involved in this case.**

The finding made by the Commission in Docket 6806 has been referred to in our statement of the case. So far as material here, it was as follows (R. 103):

> "Upon examination of all the evidence of record, we are of the opinion and find that the rates on sugar and syrup in straight carloads from points in California to points in Arizona in effect at the time of the hearing have not been shown to be unreasonable to a greater extent than the amounts of the reductions since made."

Bowie was one of the "points in Arizona" specifically mentioned in the opinion (R. 97, 100, 101).

Under controlling decisions of this Court, and of the Supreme Court, this finding can only be construed as an approval of the rates then in effect (i. e., the rates as reduced during the pendency of the proceeding), as reasonable for future application. Indeed, this very finding has already received precisely that construction, at least inferentially, in this Court's recent decision in the *Wholesale Grocery Case*. In that opinion the Court, after quoting (68 F. (2d), p. 601) a portion of the report in Docket 6806 including the above, referred to a later decision of the Commission, in which that tribunal itself declared that in Docket 6806, it "had held that the sugar rates, in effect on and after November 15, 1914 (from California origins to Arizona destinations) were not shown to be unreasonable":

> *Graham, etc., Traffic Ass'n. v. A. E. R. Co.* (1916), 40 I. C. C. 573 (576).

In the *Wholesale Grocery Case,* this Court also reviewed a finding of the Commission quite similar to, but certainly no more definite and positive than, that made in Docket 6806, and held it to have been an approval of the rates in issue. The finding was made in:

> *Graham & Gila Counties Traffic Ass'n. v. A. E. R. Co.* (1923), 81 I. C. C. 134 (143),

and was as follows:

> "As in *State of Idaho ex rel. v. Director General,* supra, the record in the instant case does not support a finding of unreasonableness."

In that case (hereinafter called the *Graham Case:* in evidence as Defendants' Exhibit D: R. 143-165), the Commission considered not only sugar rates, but also the class rates, and rates on various commodities, from points in California to destinations on the Globe branch. This Court held that the Commission's finding was, in effect, "a positive finding of a negative fact", i. e., an *approval* of the reasonableness of the sugar and other rates then under review. The equivalent finding in Docket 6806 should receive a like interpretation.

In other cases, the Commission, in making findings with respect to the issues before it, has used language similar to, and in many instances less positive than that employed in Docket 6806; nevertheless the Supreme Court, and (in one case) the Circuit Court of Appeals for the Fifth Circuit, have construed such language as constituting a definite finding that the challenged rates, etc., were reasonable (or "not un-

reasonable"), and/or as a positive approval of the rates as reasonable. In

U. S. v. New River Co. (1924), 265 U. S. 533,

the Supreme Court reviewed the Commission's decision in

Bell & Zoller Coal Co. v. B. & O. S. W. R. Co. (1922), 74 I. C. C. 433,

in which the Commission said:

> "The present facts considered, we do not conclude upon these records that the rule attacked * * * is in principle unreasonable or unduly prejudicial."

The Supreme Court said, of this finding (265 U. S., p. 537):

> "December 11, 1922, it (the full Commission) reversed the findings of Division 5 and found that Rule 4 was not unreasonable or unduly prejudicial."

The Court said further (p. 541) that the order was *"not merely negative"*, but *"clearly permitted and authorized"* the carriers to apply the challenged rule; and that it was plainly the intention and purpose of the Commission that the challenged rule should be applied. In

U. S. v. Illinois Central R. Co. (1924), 263 U. S. 515,

the Supreme Court reviewed the decision of the Commission in

Swift Lumber Co. v. F. & G. R. Co. (1921), 61 I. C. C. 485,

in which the Commission had made the following finding:

"We do not find that the rates on yellow pine * * * in effect subsequent to January 1, 1919 from Knoxo to the destinations in question were intrinsically unreasonable * * *."

The Supreme Court said (263 U. S., at p. 519):

"The Commission found that the rates from Knoxo were not unreasonable."

Elsewhere in the opinion the Court further indicated the view that this statement by the Commission should be considered the equivalent of a finding that the attacked rates were reasonable. At page 520, the Court said that the rates from Knoxo "have been found to be inherently reasonable"; and at page 524, it said that "the Knoxo rate is inherently reasonable".

In

American Wholesale Lumber Co. v. Director General (1922), 66 I. C. C. 393,

the Commission said (407):

"We find that conditions existing at the time warranted the establishment of the penalty charge and that it was not unreasonable or otherwise unlawful."

The Supreme Court twice interpreted that finding as "a positive finding of a negative fact". In

Edward Hines Trustees v. U. S. (1923), 263 U. S. 143,

the Supreme Court said (146):

"After extensive hearings the Commission held that * * * the charge then imposed had not been shown to be unreasonable."

In

Turner Lumber Co. v. C. M. & St. P. Ry. Co. (1926), 271 U. S. 259,

the Court referred to the finding twice. At page 261 it said:

> "This penalty charge was attacked as unreasonable * * * in *American Wholesale Lumber Ass'n. v. Director General,* 66 I. C. C. 393, and there held by the Interstate Commerce Commission to be neither unreasonable nor otherwise unlawful."

At page 263, the Court said:

> "The power to impose such charges, if reasonable, is clear. Those here in question have been found by the Commission to be reasonable."

In

Wheelock & Bierd v. A. C. & Y. Ry. Co. (1931), 179 I. C. C. 517,

the Commission said (523):

> "We find that the assailed divisions of the reshipping or proportional rates have not been shown to be unjust, unreasonable, or otherwise unlawful as alleged."

In construing that finding the Supreme Court twice interpreted it as a positive finding, saying, in

Alton R. Co. v. U. S. (1932), 287 U. S. 229 (at pp. 231, 237):

> "It (the Commission) found that the divisions of the so-called reshipping rates *were not unjust, unreasonable* or otherwise unlawful. * * *
>
> "By their unauthorized action the connecting carriers forced the Alton to become the moving

party before the Commission, with the result that *the Commission's approval of the divisions effected* by them was expressed in the form of a refusal to interfere." (Emphasis ours.)

In

Montgomery Cotton Exchange v. L. & N. R. Co. (1926), 112 I. C. C. 325,

the Commission made the following finding (333):

"Under the circumstances here presented we are of the opinion and find that the rates assailed were not unreasonable under Section 1."

On reconsideration of the same case the Commission said (118 I. C. C. 157, 158-159):

"With respect to the allegation of unreasonableness, we find upon reconsideration, no occasion for a modification of the conclusion in the former report that the evidence did not warrant a finding of unreasonableness. * * * We accordingly find that the applicable rates were not and are not unreasonable."

Substantially similar findings were again made upon a further hearing of the same case (153 I. C. C., at p. 402). Upon review of these expressions, the Circuit Court of Appeals for the Fifth Circuit said, in

Hohenberg v. L. & N. R. Co. (1931), 46 F. (2d) 952 (certiorari denied, 284 U. S. 617) (at p. 954):

"The contention that the rate was unreasonable was dismissed by the Commission and the same was held to be fair and reasonable."

All of the foregoing authorities were referred to and relied upon by this Court, in its opinion in the *Wholesale Grocery Case* (68 F. (2d), pp. 605-607), to support its interpretation of the Commission's finding in the *Graham Case*. They are equally pertinent to the instant case, and strongly support the interpretation for which defendants contend.

It is clear, from the text of the report in Docket 6806, that the sole essential issue there presented for the Commission's determination was the reasonableness of the rates on sugar and syrup, in carloads, from California producing points to Arizona destinations. Both in the synopsis (R. 95-96) and in the summary of the complaint, contained in the first paragraph of the opinion (R. 96-97), the Commission set forth that the complaint alleged that the rates on sugar and syrup in straight and mixed carloads from producing points in California to *all* destinations in Arizona (Bowie being particularly mentioned: R. 97, 100, 101) were unjust and unreasonable, and made it clear that no other issue was presented. Under controlling decisions, the Commission's conclusions were necessarily addressed to and constituted a determination of that particular issue.

Interstate Commerce Commission v. Stickney (1909), 215 U. S. 98 (105);

A. T. & S. F. Ry. Co. v. U. S. (1914), 232 U. S. 199 (221).

We ask the Court to conclude, in conformity with its decision in the *Wholesale Grocery Case,* that the determination made by the Commission in Docket

6806 is to be construed as an approval of the reasonableness of the rates then in effect, from California points of origin to Bowie for the reasons: (a) The issue of the reasonableness of such rates from California points of origin to all points in Arizona, and particularly to Bowie, was the essential issue presented to and necessarily determined by the Commission in Docket 6806; (b) the Commission's findings in Docket 6806 have previously been interpreted, by this Court, in the manner for which we now contend; and (c) precisely or substantially similar findings by the Commission in other cases have been construed by the Supreme Court, by this Court, and by the Circuit Court of Appeals for the Fifth Circuit, as findings of reasonableness, and as approvals of the rates or practices challenged.

Defendants duly submitted to the trial Court a proposed finding, setting forth the Commission's approval of the rates on sugar to Bowie, in Docket 6806 (Defendants' Proposed Finding No. 9: R. 198-200). That finding was rejected in its entirety (R. 207). Defendants ask this Court to conclude that the trial Court erred in that respect.

2. **The rates charged on the shipments here involved were in all instances equal to or less than the rate approved in Docket 6806, as thereafter modified by the authorized general changes.**

In our "Statement of the Case" we recited the various changes which affected the rates on sugar from California to Bowie, between May 25, 1915, the date of the decision in Docket 6806, and December 10,

1923, the date of delivery of the latest shipment upon which reparation is sought. Those changes are all set forth in detail in defendants' exhibit showing the history of the rates (Exhibit E: R. 167-168). A somewhat less detailed history of the rates appears in Plaintiff's Exhibit 1 (R. 12-13). The complete history is recited in Defendants' Proposed Findings Nos. 9 to 12, inclusive (R. 198-202), which, although founded upon the undisputed testimony, were rejected by the trial Court (R. 207).

The only changes (except the voluntary reduction of one-half cent on July 27, 1921), which affected the rates to Bowie *as charged,* were accomplished either by the Director-General of Railroads, as head of the United States Railroad Administration, or in response to findings and orders of the Commission having nation-wide effect. The modifications of 1918, 1920, and 1922, were all of the same general character, in that all rates, throughout the country, were at those times subjected to general modifications, which changes affected the sugar rates in common with substantially all other commodity rates. None of these changes was accomplished by the independent act of any of the defendants. The changes made by the Director-General were in reality imposed by the Federal Government, for the Director-General was simply the authorized agent of the President, exercising powers conferred upon him by Act of Congress.

Northern Pac. Ry. Co. v. North Dakota (1919), 250 U. S. 135 (148);

Mo. Pac. R. Co. v. Ault (1921), 256 U. S. 554 (557);

Dupont Co. v. Davis (1924), 264 U. S. 456 (462).

We ask this Court to conclude that the trial Court erred in rejecting Defendants' Proposed Findings Nos. 9 to 12, inclusive, setting forth the history of the rate to Bowie approved in Docket 6806, and Defendants' Proposed Conclusion No. 1 (R. 207-208), which sets forth, in summary form, the approval of the rate in that decision, and the subsequent charging upon the plaintiff's shipments of rates equal to, or less than, the rate so approved, as modified by the intervening general changes and incidental voluntary reduction.

3. Under the rule of the controlling decisions, the reparation order in suit is void and unenforceable.

It having been definitely established that the rates as charged upon plaintiff's shipments were in all instances equal to or less than that approved in Docket 6806, as modified by the intervening authorized general changes, it follows that the Commission's finding and order for the payment of reparation to plaintiff are void and unenforceable, because in excess of the Commission's jurisdiction under the Interstate Commerce Act. The controlling principle of law was announced by the Supreme Court in the *Arizona Case,* with which this Court is fully familiar. In substance, the Supreme Court said that a carrier which conformed to a formal declaration by the Commission, respecting the reasonableness of the rates to be

charged by it, could not thereafter be required to pay reparation for the charging of such rates, measured by the rates which the Commission in a subsequent proceeding, upon the same or a different record, thought proper to have been established. That principle was applied by this Court, in the *Wholesale Grocery Case,* to a situation not differing in any essential respect from that presented here. It was there held that when the Commission has *approved,* although not directly *prescribed,* a basis of rates to which the carrier thereafter conforms, it cannot subsequently award reparation against rates even lower than those theretofore approved.

Defendants proposed to the trial Court an appropriate conclusion of law (Defendants' Proposed Conclusion No. 2: R. 208), setting forth the invalidity of the reparation order in suit. That conclusion, in common with others proposed by defendants, was refused (R. 209). We ask this Court to hold that the trial Court erred in that respect.

4. The decision of the Circuit Court of Appeals for the Fifth Circuit in the Eagle Cotton Oil Case is of no value as an authority to support the trial Court's decision.

(a) The intervening general changes did not operate to deprive the rates charged of their status as Commission-approved rates.

In presenting the instant case to the trial Court, counsel for plaintiff relied largely upon the decision of the Circuit Court of Appeals for the Fifth Circuit, in

Eagle Cotton Oil Company v. A. G. S. R. Co. (1931), 51 F. (2d) 443.

It was asserted that that decision sustains the alleged validity of the reparation award. We have no doubt that the trial Court was influenced thereby, and we anticipate that it will be again cited by plaintiff's counsel upon this appeal. For that reason, we shall discuss the case at some length.

It is our position that the *Eagle Case*, if in point at all, conflicts with the decisions of the Supreme Court in the *Arizona Case* and other cases; that it has been overruled, in effect, by the Supreme Court's decision in the *Arizona Case;* and that consequently it is of no value as an authority.

The decision in the *Eagle Case* was rendered July 21, 1931. The Court reversed the decision (46 F. (2d) 1006) theretofore rendered in the same case by the District Court for the Southern District of Mississippi. The statement of facts, set forth in the majority opinion, shows that in 1915 the Commission, in passing upon a proposed increase in rates on coal, authorized the carriers to maintain thereafter a rate of $1.20 per ton from and to the points involved in the case.

Coal and Coke Rates (1915), 35 I. C. C. 187.

In 1917 a general advance of 10 cents per ton was made, pursuant to the decision in

Fifteen Per Cent Case (1917), 45 I. C. C. 303.

On June 25, 1918, the rate was further advanced, under authority of General Order No. 28 of the Director-General. The rate was likewise advanced in 1920, and reduced in 1922, in conformity with the general changes authorized and required by the Com-

mission in those years. The result was that following 1922, the rate became $2.03 per ton, as the evolution of the $1.20 rate approved in 1915. In

Eagle Cotton Oil Co. v. Southern Ry. Co. (1928), 140 I. C. C. 131,

the Commission undertook to award reparation against the $2.03-rate, to the extent that it exceeded $1.95 from certain mines, and $1.85 from certain others. The award was resisted, and the suit in the District Court followed.

Upon these facts the Circuit Court of Appeals held that the rate of $2.03 could not be regarded as having been fixed or prescribed by the Commission, and that there was no jurisdictional barrier to an award of reparation. The Court took notice of this Court's then recent decision in the *Arizona Case* (49 F. (2d) 563, dated March 23, 1931), but refused to apply the principle there announced.

It may be noted that one member of the Circuit Court (Circuit Judge Hutcheson) concurred in the judgment of reversal, but disagreed with the majority as to the principles involved. He declared that, in his opinion, the rate made the subject of the reparation order, while not specifically *prescribed* by the Commission, had received, speaking generally, the Commission's *approval and sanction.* He then disapproved the principle set forth in this Court's decision in the *Arizona Case,* adhering to the view that the Commission might properly award reparation against rates which it had previously prescribed or approved.

At the time of the *Eagle* decision, a petition for certiorari to review this Court's decision in the *Arizona Case* was pending before the Supreme Court; and certiorari was later granted (Oct. 12, 1931; 284 U. S. 600).

The opinion in the *Eagle Case* indicates that the majority of the Court based its conclusion, that the rates as charged were not to be regarded as Commission-made, largely upon the fact that the rates originally approved had been subjected to several intervening general changes, particularly the general changes of 1920 and 1922. The Court cited:

> *Brimstone R. & C. Co. v. U. S.* (1924), 276 U. S. 104,

and quoted a portion of that opinion, in which it was said (122):

> "The general findings and permission of *Ex Parte 74* and *Matter of Reduced Rates* did not approve or fix any particular rate. * * * In them the Commission was dealing with the whole body of rates throughout the country—was looking at the general level of all rates—and the propriety of the rates to which the Brimstone Company was party was not the subject of particular investigation or consideration."

The Court therefore concluded that the intervening changes had taken away from the original rates whatever Commission-made status they had possessed.

The rates which were the subject of the reparation award involved in the *Arizona Case* likewise passed through one of the same general changes; for the rate prescribed in the *First Phoenix Case,* in 1921, was

96½ cents; whereas the 96-cent rate, established in conformity with the Commission's order, was reduced 10 per cent, in 1922, in response to the decision in *Reduced Rates 1922,* supra, in the same manner as the rate involved in the instant case. It was strongly urged, in the argument before the Supreme Court in the *Arizona Case,* and particularly by the Interstate Commerce Commission and certain others who appeared as *amici curiae* seeking to reverse this Court's decision, that this intervening general change had operated to deprive the rates *as charged* of any Commission-made status previously bestowed upon the original 96½-cent rate. The decision in the *Eagle Case* (in which certiorari had then but recently been denied: 284 U. S. 675; Nov. 30, 1931) and the *Brimstone Case* were particularly relied upon to support this contention. A summary of the argument made by the Commission as *amicus curiae* appears in the official report of the *Arizona Case* (284 U. S., at p. 380).

While the point does not receive specific mention in the opinion, the Supreme Court in effect decided the contrary, for it concluded, apparently without difficulty, that the rates as actually charged retained the Commission-made status conferred, *prior* to the change, upon the rate out of which they had evolved. The Court's failure to discuss the point in the opinion did not render the decision any the less a complete disposition of the issue; the question, having been duly and fully presented, was necessarily resolved by the Court's judgment.

Grubb v. Public Utilities Comm. (1930), 281 U. S. 470 (477-478);

Fidelity Co. v. U. S. (1902), 187 U. S. 315 (319);

Capuccio v. Caire (1932), 215 Cal. 518 (530).

This Court may recall that a somewhat similar argument was made by counsel appearing as *amici curiae* in the *Arizona Case*. Reference to this argument will be found in the concluding portion of this Court's opinion (49 F. (2d), at p. 571). Reference was made by those counsel to the *Brimstone Case;* but this Court reached the conclusion, in which it was sustained (as above noted) by the result of the Supreme Court's decision, that the intervening general change of 1922 had not operated to deprive the rates of the Commission-made status conferred in 1921.

It is not open to question that the general change of 1922 was precisely the same, in its essential character, as the general changes of 1918 and 1920. In fact, the changes of 1920 and 1922 are treated as having been the same, in legal effect, by both the Supreme Court, in the *Brimstone Case* (276 U. S., pp. 112-113, 122-123), and by the Circuit Court of Appeals for the Fifth Circuit, in the *Eagle Case*.

Consideration of the facts involved in the *Wholesale Grocery Case* further supports our position. The rates actually reviewed by the Commission in the *Graham Case,* and there approved, were those in effect on January 18, 1922 (see 81 I. C. C., at p. 138; Defendants' Exhibit D: R. 151). The shipments involved in that proceeding moved during 1923, 1924, and 1925: and since the general percentage change of 1922 became effective on July 1st of that year, obviously the

rates charged were in all instances the rates considered and approved by the Commission, *as modified by that intervening change.* Nevertheless, this Court found no difficulty in reaching the conclusion that they had retained their Commission-approved status, and that reparation could not be awarded for their assessment. To that extent this Court's recent decision is apparently in disagreement with the conclusions of the Circuit Court for the Fifth Circuit in the *Eagle Case.*

The decision of the Special District Court for Arizona (Judges Sawtelle, James, and Jacobs sitting) in

E. P. & S. W. R. Co. v. Arizona Corporation Commission (1931), 51 F. (2d) 573,

is also inconsistent with the views announced in the *Eagle Case,* but wholly consistent with the position taken by the Supreme Court and by this Court in the *Arizona Case* and the *Wholesale Grocery Case.* In that case the plaintiff sought to have the Arizona Commission permanently enjoined from awarding reparation against certain intrastate rates which, prior to 1921, it had approved. Subsequent to that approval, the Interstate Commission authorized the general increase of 1920, which the Arizona Commission refused to permit to become effective upon Arizona intrastate traffic. The Interstate Commission thereupon exercised its paramount jurisdiction, and required the state rates to be advanced in the same manner as the interstate rates. Later, the Arizona Commission assented to the increase. The Arizona rates were also subjected to the general reduction of July 1, 1922.

The Court held that, despite the general advance and reduction since the rates were first approved, those rates, as charged *subsequent* to 1922, were not subject to reparation, and permanently enjoined the attempted award. The Court cited (51 F. (2d), p. 577) and relied upon the principle stated by this Court in the *Arizona Case.* No appeal was taken from the District Court's decision.

It seems clear that if the general modification of 1922 was ineffective to deprive rates prescribed or approved by the Commission prior thereto of their Commission-made status, when applied and collected subsequent to the change, then equally the general changes of 1918 and 1920 were also inoperative to deprive a rate approved by the Commission prior thereto of its status as a Commission-made rate. The Supreme Court, this Court, and the Special District Court for Arizona have all declared, either expressly or by refusal to give heed to the opposing view urged by interested parties, that the general modification of 1922 did not take away the "Commission-made" status of a previously approved or prescribed rate. To the extent that the *Eagle Case* declares a contrary principle, and relies thereon in order to sustain an award of reparation against a rate previously approved, it is in conflict with the decisions of the Supreme Court and of this Court in the *Arizona Case* and the *Wholesale Grocery Case,* and of the District Court for Arizona in the *El Paso and Southwestern Case,* and therefore of no value as an authority in the instant proceeding.

(b) The effectiveness of the Commission's finding in Docket 6806, approving the rates, was not destroyed by the lapse of time intervening prior to the charging of the assailed rates.

It may nevertheless be argued that even if the Commission's finding in Docket 6806 can be construed as an approval of the rates in effect at the date of the decision, nevertheless it lost its effective force after two years, and is therefore wholly inoperative to bar the subsequent award of reparation here in suit. Such an argument undertakes to distinguish between the instant case and the *Arizona Case,* in that there the decision prescribing the rates for the future, against which reparation was later awarded, was rendered in 1921. We assume that plaintiff's counsel will stress the point that prior to 1920, an order of the Commission prescribing rates for the future could not, under Section 15 of the Act, continue in effect for more than two years; whereas, under the Act as amended in 1920, an affirmative order prescribing future rates may now continue in effect for an indefinite period, and until changed. It may be noted that the Circuit Court, in deciding the *Eagle Case,* relied to some extent upon this consideration.

It is our position that this argument, if it be made, is legally untenable, and essentially illogical, and that the *Eagle Case,* to the extent that it appears to support that argument, is erroneous because in conflict with controlling decisions of the Supreme Court.

It should be noted that defendants do not rely at all upon the *order* made in Docket 6806. Their defense is based upon the express *finding* there made by the

Commission, particularly as that finding was addressed to the rate made effective, during the pendency of the case, from California points to *Bowie*. The Commission's *order* in Docket 6806 (R. 104-105) related entirely to rates *for the future to Phoenix and Prescott,* neither of which points is involved as the destination of any of plaintiff's shipments. While that order refers to and by reference includes the opinion, the context makes it apparent that such reference was merely for the purpose of affording proper support, through an express finding of fact, for the affirmative order respecting the future rates to Phoenix and Prescott. No affirmative *order* was made, dealing with the rates to Bowie; and the *finding* contained in the opinion, relating to the rates to that point, was therefore not an essential part of the order, as made.

This Court, in concluding the opinion in the *Wholesale Grocery Case,* pointed out (68 F. (2d), p. 609) that an opinion and an order of the Commission are to be read together, and the former is to be treated as part of the latter; but clearly that principle applies only where the opinion and the order both relate to the same subject matter, and are each essential to the other. There may be, however, circumstances in which the two must be considered separately. Certainly the Act, as well as the decisions of the Supreme Court and the inferior Federal Courts, recognize a substantial distinction between an *order* of the Commission, which is mandatory, and its findings, which are merely directory. The Act itself treats of the two separately. Authority to make findings and to incorporate them

in formal opinions is contained in Section 14 of the Act; whereas Section 15 confers authority to make orders *for the future,* and Section 16 (1) authorizes the making of *reparation* orders. Moreover, the Commission may, and in many instances does, write an opinion, incorporating therein formal findings, but forbears to make *any* order. Such action was taken in two proceedings which are referred to frequently in the record (R. 84, 89-93, 173) in the instant case:

Reduced Rates 1922, supra;

Arizona Corp. Comm. v. A. E. R. Co. (1926), 113 I. C. C. 52; (on rehearing, 1928), 142 I. C. C. 61.

The Commission also follows the rather common practice of making orders, without any accompanying opinions or findings. Such orders are not officially reported, and therefore no examples are available to be cited here; but every practitioner before the Commission is familiar with the practice.

The essential distinction between the Commission's findings and its orders has been recently emphasized by the Supreme Court, in

U. S. v. A. B. & C. R. Co. (1931), 282 U. S. 522.

That proceeding involved an attempt by the carrier to enjoin an alleged *order* of the Commission in a proceeding relating to the carrier, although it appeared that no *formal order* had been made, and that the Commission had merely rendered an *opinion,* containing certain *findings* to which the carrier objected. The Supreme Court held that the opinion and the findings were not an order, and therefore not subject

to an injunction proceeding under the Act of June 18, 1910 (36 Stat. 539). It said (527):

> "* * * The action here complained of is not in form an order. It is a part of a report—*an opinion as distinguished from a mandate. The distinction between a report and an order has been observed in the practice of the Commission ever since its organization—and for compelling reasons.* Its functions are manifold in character. In some matters its duty is merely to investigate and to report facts. See *United States v. Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, 310. In others, to make determinations. See *Great Northern Ry. Co. v. United States*, 277 U. S. 172. In some, it acts in an advisory capacity. Compare *Minneapolis & St. Louis R. Co. v. Peoria & Pekin Union Ry. Co.*, 270 U. S. 580, 584-5. In others in a supervisory. *Even in the regulation of rates, as to which the Commission possesses mandatory power, it frequently seeks to secure the desired action without issuing a command.* In such cases it customarily points out in its report what the carriers are expected to do. *Such action is directory as distinguished from mandatory.* No case has been found in which matter embodied in a report and not followed by a formal order has been held to be subject to judicial review." (Emphasis ours.)

In

> *Brady v. Interstate Commerce Commission* (1930), 43 F. (2d) 847 (affirmed, *per curiam:* 283 U. S. 804),

the District Court for the Northern District of West Virginia (three Judges sitting), speaking through

Circuit Judge Parker, emphasized the distinction between the *findings,* upon which a reparation order complained of was based, and the *order* itself, saying (850):

> "We think it clear that the suit should be dismissed. In the first place, it is clearly not a case 'brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission', to use the language of the section relied on; for the reason that it seeks not to set aside the order of the Commission, but to correct alleged errors in the findings of the Commission upon which that order is based. The order of the Commission is that which commands the railroads to pay complainant the sum of $12,-838.31 by way of reparation, not the recitals of findings of fact. An 'order' is a 'mandate, precept; a command or direction authoritatively given; a rule or regulation'. *Black's Law Dictionary;* 46 C. J. 1131; 42 C. J. 464. An order of the Commission is analogous to the judgment of a court; and it is well settled that the findings upon which a judgment is based constitute no part of the judgment itself even though incorporated in the same instrument. 15 R. C. L. 570; *Judge v. Powers,* 156 Iowa 251, 136 N. E. 315, Ann. Cas. 1915B, 280. As said by Judge Learned Hand in *Eckerson v. Tanney* (D. C.), 235 F. 415, 418, 'The judgment itself does not reside in its recitals, but in the mandatory portions.' *It has been expressly held that findings of the Commission embodied in its reports are not orders within the meaning of the statutes relating thereto"* (emphasis ours).

Other cases to the same effect include:

American Sugar Refining Co. v. D. L. & W. R. Co. (C. C. A. 3rd, 1913), 207 Fed. 733 (740-741);

C. B. & Q. R. Co. v. Merriam (C. C. A. 8th, 1922), 297 Fed. 1 (3-5).

In view of these controlling decisions, it seems unnecessary to discuss the distinction further; but it may be observed that whereas the Commission's *findings,* contained in its reports, are subsequently published in the bound volumes of the Commission's reports and thus, under Section 14 of the Act, become matters of judicial notice, the *orders* are not customarily carried into the published reports, do not appear in the bound volumes of the Commission's decisions, and therefore receive judicial notice only if properly brought before the Court as a part of the record, as has been done (R. 8-36, 95-165) with certain reports and orders relied upon by the parties in the instant case.

The essential reason for drawing this sharp distinction between the finding in Docket 6806, as it related to the rates to Bowie, and the order there entered, which related only to the rates to Prescott and Phoenix, is to demonstrate that the two-year limitation did not apply to the finding upon which the defendants rely. Section 15 of the Act, which authorized the making of the order, also contained the express limitation that the order so made could have an effective life of not more than two years; and indeed that limitation was explicit in the order (R. 105).

No such limitation was contained in Section 14 of the Act, as it read in 1915, and no such limitation now appears in that section. No such limitation appears in the opinion in which the findings relating to the rates to Bowie and other destinations, other than Prescott and Phoenix, were set forth. The two being essentially distinct, and *the findings in particular being in no wise dependent upon the order,* it should be clear, without any necessity to cite authorities further, that the limitation did not and was not intended to extend to those findings. However, decisions of the Supreme Court specifically sustain our view that the two-year limitation, as it existed prior to 1920, had no application to findings made by the Commission. In

S. P. Co. v. Interstate Commerce Commission (1911), 219 U. S. 433,

one of the questions directly presented and passed upon by the Supreme Court was whether the limitation applied to the Commission's findings, as well as to its order, in such manner as to render moot a suit involving the validity of one of its decisions, which suit had not reached final determination within the two-year period. The Supreme Court held directly that the limitation did not govern, saying:

> "The considerations just stated dispose of the entire controversy except in one particular. It is claimed at bar that the questions arising for decision are moot, since in consequence of the lapse of more than two years since the order of the Commission became effective, by operation of law the order of the Commission has spent its force, and therefore the question for decision is moot. The contention is disposed of by *Southern*

Pacific Terminal Co. v. Interstate Commerce Commission, this day decided, *post*, p. 498. In addition to the considerations expressed in that case it is to be observed that clearly the suggestion is without merit, in view of the possible liability for reparation to which the railroads might be subjected if the legality of the order were not determined and the influence and effect which the existence of the rate fixed for two years, if it were legal, would have upon the exercise by the railroads of their authority to fix just and reasonable rates in the future, clearly causes the case to involve not merely a moot controversy."

In

Southern Pacific Terminal Co. v. Interstate Commerce Commission (1911), 219 U. S. 498,

there was involved the question of the validity of a decision rendered in 1908, when the two-year limitation appeared in the Act. It was contended that since the two-year period had passed, the case had become moot. The Supreme Court said (at p. 515):

"In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. *The questions involved in the orders of the Interstate Commerce Commission are usually continuing* (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress" (emphasis ours).

The decision in the *A. B. & C. Case,* supra, also indicates that the *findings* of the Commission, addressed to existing or future rates, considered apart from its *orders,* themselves possess sufficient force to constitute a determination of the matters with which they deal; and this principle is further sustained by other decisions. In

Western Paper Makers' Chemical Co. v. U. S. (1926), 271 U. S. 268,

the Supreme Court discussed the effect to be given to an administrative determination by the Commission, saying (R. 270-271):

> "* * * Counsel agreed upon a short statement of the whole evidence sufficient to enable this court to consider whether there was any evidence to support the *findings* of the Commission.
>
> The objections as presented here in brief and argument were addressed mainly to the soundness of the reasoning by which the Commission reached its conclusions. It was urged that these are inconsistent with conclusions reached by it in similar cases; that the *findings* are inconsistent with some views expressed in its reports in this proceeding; that some evidence was improperly considered; and that inferences drawn from some of the evidence were unwarranted. These objections we have no occasion to discuss. The determination whether a rate is unreasonable or discriminatory is a question on which the *finding* of the Commission is conclusive if supported by substantial evidence, unless there was some irregularity in the proceeding or some error in the application of the rules of law. (Citing cases.) * * * There was ample evidence to support the

finding that the joint through rates regarded as entireties were reasonable and justified" (emphasis ours).

In

Virginian R. Co. v. U. S. (1926), 272 U. S. 658,

the Court discussed the conclusive effect of a finding relating to future rates, saying (665-666):

"The Virginian contends that the evidence before the Commission does not support its *finding* that the rates on coal from the Virginian's mines * * * are unreasonable. * * * The *finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal 'informed by experience'*. * * * This court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with *findings* made in other proceedings before it. * * * This fact, and much else in the voluminous record, affords substantive evidence to support the *finding* that the existing rates are unreasonable; and that those which the order directs are reasonable" (emphasis ours).

The Commission has itself declared that its findings are binding upon the parties, even where not accompanied by orders. In

Owensboro Wheel Co. v. Director General (1922), 69 I. C. C. 503,

the Commission referred to its report in a prior proceeding, saying (506):

"Defendants apparently consider that our *findings* in that case were not binding upon the car-

> riers, because *no order* was entered therein; but in view of the nature of that proceeding the contention is without merit."

To the same effect, see also:

> *Fels & Co. v. Penn. R. Co.* (1912), 23 I. C. C. 483 (486-487).

The text of the opinion in the *Eagle Case* shows that the Court completely overlooked the distinction between the Commission's findings and its orders, in reaching its conclusion. That decision proceeds upon the assumption that the carriers were relying, not upon a *finding,* but upon an *order* made in 1915. For that reason alone it is clearly not in point here. If, however, the decision is to be construed as declaring that, because of the statutory limitation upon orders prior to 1920, a *finding* made by the Commission in 1915 lost its validity and was of no avail after two years, it is squarely in conflict with the above decisions of the Supreme Court, and therefore erroneous, and cannot be given controlling effect in the instant case.

The opinion in the *Eagle Case* loses sight also of the well understood principle at law, frequently announced by the Supreme Court, that when the Commission, acting in its administrative capacity, makes a determination regarding the reasonableness of a particular rate *for future application,* that determination is conclusive, provided the Commission has proceeded upon the basis of at least some evidence, and has not exceeded the powers conferred by Constitution or statute; that a rate prescribed or approved by the

Commission pursuant to that determination is conclusively presumed to be lawful, until the Commission thereafter makes some change in its determination. More briefly stated, the rule is that a Commission-made or approved rate, as applied to traffic moving after the Commission has rendered its decision and until a further decision is made, carries with it a *conclusive* presumption of lawfulness. That principle is inherent in the decision in the *Arizona Case;* in fact, it is the basis for the conclusion that the Commission, acting in a quasi-judicial capacity to award reparation, "was bound to recognize the validity of the rule of conduct prescribed by it" in its administrative capacity, "and not to repeal its own enactment with retroactive effect." Leading cases which establish the same basic principle include:

Interstate Commerce Commission v. Union Pac. R. Co. (1912), 222 U. S. 541 (547, 548);

Western Paper Makers' Chemical Co. v. U. S., supra;

A. T. & S. F. Ry. Co. v. U. S. (1914), 234 U. S. 294 (311);

Virginian R. Co. v. U. S., supra.

It will be observed that some of these cases were decided prior to 1920, and others since; but the principle they announce does not vary. The decision in the *Arizona Case* follows the same principle, and makes it quite clear that a decision of the Commission prescribing or approving rates *for the future* confers upon the rates so approved or prescribed a conclusive presumption of reasonableness, as long as the Commission's determination remains unchanged. The opin-

ion in the *Eagle Case* disregards this well-established principle, and proceeds upon the directly contrary theory that even though the Commission, having approved a rate for future application, thereafter takes *no* action, the conclusive presumption nevertheless disappears at the end of two years, and the approved rate may then be found to have been unreasonable, and made the subject of a reparation order, even though the carriers have applied the rate *as approved,* without any change other than those properly authorized by governmental authorities. The decision in the *Eagle Case,* to the extent that it proceeds upon that theory, clearly conflicts with the principles laid down by the Supreme Court in the decisions cited and in numerous other decisions, and particularly with the basic principle of the *Arizona Case.* For this additional reason, therefore, the *Eagle Case* cannot be regarded as a controlling authority in the premises.

We anticipate that it may possibly be asserted that the *Eagle Case* has acquired the status of a decision approved by the Supreme Court, certiorari having been denied. It is well established that denial, by the Supreme Court, of a writ of certiorari imports no expression of opinion upon the merits, and is not in any sense an affirmance of the decision.

> *U. S. v. Carver* (1921), 260 U. S. 482 (490);
> *Hamilton Shoe Co. v. Wolf Bros.* (1916), 240 U. S. 251 (258).

The Court should conclude that the *Eagle Case* is not a controlling precedent in the instant proceeding, for the reasons above set forth, and that the trial

Court, to the extent that it relied thereon in arriving at its decision, committed material error requiring the reversal of the judgment.

II.

THE RATES AND CHARGES ASSESSED UPON THE SHIPMENTS UPON WHICH REPARATION IS CLAIMED WERE NOT UNREASONABLE.

1. The substantive issue of the reasonableness of the rates as charged was properly presented for determination by the trial Court. That determination may be reviewed by this Court upon this appeal.

Before discussing the character and legal sufficiency of the evidence received at the trial, it is desirable to call attention to certain general provisions of law which govern the conduct and decision of reparation proceedings.

The instant case is a reparation suit of the character provided for by Section 16(2) of the Interstate Commerce Act (49 U. S. Code, Section 16-2). So far as material here, that section provides:

> "If the carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file * * * a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the Circuit (now District) Court of the United States shall proceed in all respects like other civil suits for damages, except that *on the trial of such suit the findings and order of the Commission shall be*

prima facie evidence of the facts therein stated * * *'' (emphasis ours).

The Supreme Court and the inferior Federal Courts, in a series of cases, have construed this statute as preserving, for the defendant carrier, the right to a trial *de novo,* in Court, upon the substantive issue whether the rates attacked for reparation purposes were unreasonable or otherwise in violation of law, and have declared that in such trial the findings and order of the Commission are mere *prima facie* evidence.

In

Meeker v. Lehigh Valley R. Co., supra,

the Court said (236 U. S., at p. 430):

> ''It is also urged, as it was in the courts below, that the provision in Sec. 16 that, in actions like this, 'the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated' is repugnant to the Constitution in that it infringes upon the right of trial by jury and operates as a denial of due process of law.
>
> *This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury.* At most therefore it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents'' (emphasis ours).

In

Lewis-Simas-Jones Co. v. Southern Pacific Co., supra,

the Court referred to the *Meeker Case,* saying (283 U. S., at pp. 660-661):

> *"The Act does not create a cause of action based on the Commission's findings and reparation order* for the recovery of money collected as freight charges based on rates alleged to be unjust and unreasonable. It makes a determination by the Commission of the unreasonableness of the rate attacked and the extent that it is, if at all, excessive a condition precedent to suit.
>
> Section 16(2) provides that, if the carrier shall not comply with an order for the payment of money within the time specified, the person for whose benefit it was made may file in the district court of the United States 'or in any state court of general jurisdiction' a petition setting forth briefly 'the causes for which he claims damages and the order of the Commission', and that the suit in the United States court shall proceed in all respects 'like other civil suits for damages' except that the findings and order of the Commission shall be prima facie evidence of the facts therein stated. The section contains nothing relating to evidence or procedure in state courts. *It is clear that the action is not on the award as such"* (emphasis ours).

In

Spiller v. A. T. & S. F. Ry. Co. (1920), 253 U. S. 117,

the Supreme Court referred with approval to the *Meeker Case,* supra, saying (131-132):

> "And the fact that a reparation order has at most only the effect of *prima facie* evidence (cit-

> ing cases), *being open to contradiction by the carrier when sued for recovery of the amount awarded,* is an added reason for not binding down the Commission too closely in respect of the character of the evidence it may receive * * *."

A rather full discussion of the nature of a reparation suit is contained in the very recent decision in:

B. & O. R. Co. v. Brady (1933), 288 U. S. 448.

In that opinion the Court said (457-458):

> "This is not a suit authorized by Sec. 9 but one brought under Sec. 16(2) because of defendants' refusal to comply with the Commission's order. Subject to *the right of contestation preserved by the Act* (*Meeker v. Lehigh Valley R. Co.,* 236 U. S. 412, 430) it is a suit for the enforcement of the award. Sec. 16(3) (f). *Lewis-Simas-Jones Co. v. Southern Pacific Co.,* 283 U. S. 654, 661. Section 16(2) does not permit suit in the absence of an award, and if the Commission denies him relief, a claimant is remediless. *Standard Oil Co. v. United States,* 283 U. S. 235. *Brady v. United States,* 283 U. S. 804. *Bartlesville Zinc Co. v. Mellon,* 56 F. (2d) 154. No suit is permitted if the carrier pays the award. *Louisville & N. R. Co. v. Ohio Valley Tie Co.,* 242 U. S. 288. *Cf. Penna. R. Co. v. Clark Coal Co.,* 238 U. S. 456. Plaintiff may not adopt the award as the basis of his suit and then attack it. *Cf. Mitchell Coal Co. v. Penna. R. Co.,* 230 U. S. 247, 258.
>
> The fact that the Act merely makes the findings and report of the Commission *prima facie* evidence and so *preserves the defendant's right to contest the award* gives no support to plaintiff's

> contention that it does not bind him. It is to be remembered that, by electing to call on the Commission for the determination of his damages, plaintiff waived his right to maintain an action at law upon his claim. But the carriers made no such election. Undoubtedly it was to the end that they be not denied the right of trial by jury that *Congress saved their right to be heard in court upon the merits of claims asserted against them*" (emphasis ours).

In an early case under the Act, the carriers' (and the shippers') right to introduce additional evidence dealing with the ultimate issues, and thus in effect to have a trial *de novo,* was recognized. In

> *C., N. O. & T. P. Ry. Co. v. Interstate Commerce Commission* (1896), 162 U. S. 184,

the Supreme Court said (196):

> "The theory of the Act evidently is, as shown by the provision that the findings of the Commission shall be regarded as *prima facie* evidence, that the facts of the case are to be disclosed before the Commission. *We do not mean,* of course, *that either party, in a trial in the court, is to be restricted to the evidence that was before the Commission* * * *" (emphasis ours).

In

> *Pittsburgh & W. V. Ry. Co. v. United States* (1924), 6 F. (2d) 646,

the District Court for the Western District of Pennsylvania (three judges sitting) held, in an opinion written by Circuit Judge Woolley, that an injunction would not lie against the enforcement of a reparation

order of the Commission, for the reason that the carriers against whom the order was directed were enabled under the law to have a full trial of the issues of fact. The Court said (648):

> *"An order of the Commission awarding reparation is not a cause of action. Nor is it in the nature of a judgment* on which execution may issue. It is an award of money damages and is declared by statute to be evidence, and then only prima facie evidence, of the facts found by the Commission (section 16 of the Interstate Commerce Act of February 4, 1887 (24 Stat. 379), as amended by section 13 of the Act of June 18, 1910 (36 Stat. 539), (Comp. St. Sec. 8584)), to be used only as such in an action which may be instituted after default by a carrier to obey the order of payment. *The provision in section 16* of the Act that, 'the findings and order of the Commission shall be prima facie evidence of the facts therein stated' *has been held by the Supreme Court only to establish a rebuttable presumption"* (emphasis ours).

The opinion then referred to the language, above quoted, from the opinion in the *Meeker Case,* and cited that case, and a number of other Federal Court decisions.

In

Brady v. Interstate Commerce Commission, supra,

the Court announced conclusions consistent with the decisions above cited. After referring to the *Pittsburgh Case,* the Court quoted (43 F. (2d), p. 852)

from the opinion in the *Meeker Case,* and said further:

> *"If therefore the carrier deems the order erroneous, it has full opportunity to correct the error or defend against it upon the trial.* * * * The order and findings of the Commission are *prima facie* evidence, just as is the report of an auditor is an action at law" (emphasis ours).

In

> *Blair v. Cleveland, C., C. & St. L. Ry. Co.* (1931), 45 F. (2d) 792,

the Court said (793):

> "Under section 16 of the statute the findings and order of the Commission are prima facie evidence of the facts therein stated. The effect of this statute is as stated by *Meeker v. Lehigh Valley Railroad Co.,* 236 U. S. 414, 35 S. Ct. 328, 59 L. Ed. 644, Ann. Cas. 1916B, 691, to establish a rebuttable presumption, cutting off no defense, and taking no question of fact from either court or jury. It merely creates a rule of evidence and does not abridge the rights of either party. To the same effect are *Mills v. L. V. R. R. Co.,* 238 U. S. 473, 35 S. Ct. 888, 59 L. Ed. 1414; *Pittsburgh & W. V. Ry. Co. v. United States* (D. C.) 6 F. (2d) 646; and *Missouri, K. & T. R. Co. v. Interstate Commerce Commission* (C. C.), 164 F. 645.
>
> *The hearing in this court is de novo, and the court is entitled to receive and consider evidence in addition to that before the Commission,* but the *prima facie* case made out by the findings and order of the Commission will prevail *unless overcome by evidence submitted by defendants"* (emphasis ours).

In

Atlantic Coast Line R. Co. v. Smith Bros. (C. C. A., 5th, 1933), 63 F. (2d) 747; (certiorari *denied,* May 29, 1933; 289 U. S. 761),

the Court said (at p. 748):

"The *prima facie* effect which the statute accords to the findings and orders of the Commission (in a reparation case) * * * is of course rebuttable * * *; but until rebutted it does make out a case * * *" (citing, among others, the *Meeker,* and *Blair Cases,* supra, and the *Sou. Ry. Case,* infra).

To the same effect, see:

Southern Ry. Co. v. Eichler (C. C. A. 8th, 1932), 56 F. (2d) 1010 (1018).

At the trial of this case counsel for plaintiff did not dispute the propriety of a determination by the trial Court of the substantive issue of the reasonableness of the rates charged, apparently recognizing the controlling principles of the decisions above cited. This attitude was consistent with the position taken by the same counsel, then representing the Arizona Grocery Company, at all stages of the *Arizona Case.* Indeed, plaintiff introduced evidence in addition to the opinion and reparation order (Plaintiff's Exhibit 4, and the accompanying testimony of Witness Reif: R. 85-94) which could have had no other purpose than to support its essential allegations of fact, thus plainly indicating the view of counsel that the issue was open, and that the trial was *de novo.*

Nevertheless, we anticipate that it may be argued, upon this appeal, that the Commission's purported

determination of the unreasonableness of the rates charged must now be regarded as conclusive, there having supposedly been at least *some* evidence before it upon which that determination was based. In this behalf reference may be made to two recent decisions:

South Carolina Asparagus Growers Ass'n. v. Southern Ry. Co. (C. C. A. 4th, 1933), 64 F. (2d) 419;

and

Glenns Falls Portland Cement Co. v. D. & H. Co. (C. C. A. 2nd, 1933), 66 F. (2d) 490.

An examination of these opinions will indicate that in both, the view that the Commission's findings are conclusive upon the Courts, *in reparation suits,* was based upon excerpts from the opinion in:

Mitchell Coal Co. v. Pennsylvania R. Co. (1913), 230 U. S. 247.

The language relied upon is found principally at pages 257 and 258 of that opinion. The Supreme Court there said, in part, that the shipper's right to sue at common law for the charging of unreasonable rates in the past was abrogated by the Interstate Commerce Act; and a right was given, which, as a condition precedent, required a finding of unreasonableness by the Commission. It then said, further, that orders of the Commission,

> "so far as they are administrative, are conclusive, whether they relate to past or present rates, and can be given general and uniform operation, since all shippers, who have been or may be affected by the rate, can take advantage of the ruling and

> avail themselves of the reparation order. They are quasi-judicial and only *prima facie* correct, in so far as they determine the fact and amount of damage—as to which, since it involves the payment of money and taking of property, the carrier is by Section 16 of the Act given its day in court and the right to a judicial hearing."

The opinion in the *Glenns Falls Case* also refers to and relies upon:

Adams v. Mills (1932), 286 U. S. 397 (410).

It should be clear, upon analysis, that these two decisions of the Circuit Courts cannot be regarded as well-reasoned or controlling. They fail completely to recognize and give effect to one of the most important statements contained in the *Mitchell Case;* namely, that reparation orders of the Commission are *quasi-judicial,* and only *prima facie* correct, in so far as they determine the *fact* and amount of damage, and the carrier is by statute given its day in Court, *and the right to a judicial hearing.* Moreover, they appear to disregard entirely the more recent *Meeker* and *Lewis-Simas-Jones Cases,* in which the Supreme Court emphasizes that the statute constitutes merely "a rule of evidence", under which a mere rebuttable presumption in favor of the reparation claimant is created, and that no question of fact is taken from either Court or jury. They likewise overlook the express provision of the statute, also emphasized in these decisions, that the suit shall proceed *in all respects like other civil suits for damages.* Finally, they fail to consider the affirmance of these principles, and the outright state-

ment that "the carrier's right of defense is in no wise impaired", in the most recent decision in point:

B. & O. R. Co. v. Brady, supra.

It is of interest to note that the Circuit Court for the Second Circuit admits (66 F. (2d), p. 494) that the Federal Courts are not in unanimity upon this question, particular reference being made to the *Blair Case,* supra.

The view stated in the *South Carolina* and *Glenns Falls Cases* also loses sight of the essential distinction between orders of the Commission operating *for the future,* which are *legislative* in character, and *conclusive* against attack in the Courts, provided only that they are jurisdictionally made and supported by at least some competent evidence; and findings and orders *for reparation,* which operate only upon *past* transactions, are *quasi-judicial* in character, and are specifically given mere *prima facie* effect by the statute and the controlling decisions. The essential distinction between these two types of orders has frequently been stated; for example, in the *Mitchell Case* (230 U. S., p. 259), the *Arizona Case* (284 U. S., pp. 388-389); and in:

Baer Bros. v. D. & R. G. R. Co. (1914), 233 U. S. 479 (486);

Great Northern Ry. Co. v. Merchants Elevator Co. (1922), 259 U. S. 285 (291).

The interpretation advanced in these two cases likewise loses sight of the possible unconstitutionality of the statute, if it should be so construed and applied as to cut off the right of the defendants to a trial of

the issues of fact before a jury. The opinion in the *Meeker Case* shows that this consideration strongly influenced, if it did not control, the conclusion therein, the Court apparently taking the view, announced in controlling decisions, that the statute should be so construed as to avoid bringing it into possible conflict with the Constitution:

Harriman v. I. C. C. (1908), 211 U. S. 407 (422);

Ann Arbor R. Co. v. U. S. (1930), 281 U. S. 658 (669).

It will hardly be questioned that the substantive issue is properly presented by the pleadings. The complaint alleges, if not directly at least by reasonable inference, that the rates against which reparation is sought were unreasonable, in violation of the Act, and that plaintiff was damaged by their assessment and collection, and the defendants' refusal to pay reparation (Paragraphs III, VIII: R. 3, 6). The amended answer specifically denies (Paragraph II: R. 46-47) that the rates were unreasonable or otherwise unlawful; and alleges further, as a matter of affirmative defense (Paragraph VII: R. 50) that each and all of said rates were at all times reasonable, and in full conformity with all the requirements of the Act.

Both the plaintiff and the defendants proposed findings (Plaintiff's Proposed Finding No. X: R. 65; Defendants' Proposed Finding No. 16: R. 207) to cover this issue. The Court rejected defendants' proposed finding (R. 207), and adopted that proposed by plaintiff (R. 215), to the effect that the freight

rates as charged and collected were unjust and unreasonable. Defendants duly excepted to the latter finding, and assigned error (Assignment of Error No. 20: R. 251-252), upon the ground that the Court's finding was not supported by competent evidence, and was and is contrary to the uncontradicted evidence. Defendants likewise moved for a nonsuit at the conclusion of plaintiff's testimony, and for judgment on the pleadings and the evidence at the conclusion of the testimony, which motions were denied, and exceptions duly saved (R. 94-95, 186). The issue is thus properly before this Court for its determination.

Fleischmann Co. v. U. S. (1926), 270 U. S. 349 (356);

Maryland Casualty Co. v. Jones (1929), 279 U. S. 792.

Particularly, the instant case being an action to enforce a reparation award, this Court has a right to examine the record here before it to determine whether the finding and order in suit were properly supported by evidence. In

Southern Ry. Co. v. Eichler, supra,

the Court said (56 F. (2d), at pp. 1018, 1019):

> "This appeal is to review the judgment of the District Court in a suit to enforce an order of the Interstate Commerce Commission. In that action the order of the Commission is made *prima facie* evidence of the findings made by it. *It is for this reason that appellate courts have a duty to examine the evidence for the purpose of ascertaining whether such findings are substantially supported;* and, in so doing, they are confined to the record presented for review. In that record we

> find the order of the Commission sought to be enforced, *the testimony of witnesses introduced at the trial* * * * We are not permitted to go outside that record on this appeal * * * *We have carefully considered the evidence preserved and presented for review* * * *'' (emphasis supplied).

It may be added that the Court, upon such review, after an exhaustive examination of the record, reversed the District Court's judgment, and in so doing also reversed, in effect, the Commission's findings and order.

We ask the Court to conclude that determination of the substantive issue of the reasonableness of the rates was not foreclosed or precluded, by reason of the finding and order for the payment of reparation upon which the suit is predicated; that in this suit an independent re-examination of that issue may be made by the trial Court, upon the evidence introduced before that Court; that such re-examination by the trial Court may be thereafter reviewed upon appeal; and that the issue is properly before this Court for review, upon this appeal.

2. Plaintiff's evidence is wholly inadequate, as a matter of law, to support the trial Court's finding and conclusion that the rates and charges in issue were unreasonable.

The evidence offered by plaintiff, and relied upon by the trial Court to support its findings and conclusions, consisted principally of the following:

> (a) The Commission's opinion in the *Third Phoenix Case,* containing the finding that the

rates in issue, as applied, were unreasonable (Plaintiff's Exhibit 1: R. 8-27, 83);

(b) The reparation order, dated April 14, 1930, in favor of plaintiff (Plaintiff's Exhibit 2: R. 41-42, 84);

(c) Plaintiff's Exhibit 4, and the accompanying oral testimony of Witness Reif (R. 85-94).

The balance of plaintiff's showing consisted of the Rule V statement (Plaintiff's Exhibit 3: R. 37-40, 91), which sets forth simply the details of the shipments upon which reparation is sought, but otherwise establishes no legal liability, apart from the finding and order; and certain reports of the Commission, introduced *by reference,* without objection (R. 84). As we shall explain later, these decisions, if relevant at all, clearly support findings and conclusions directly contrary to those adopted.

We shall first discuss the value, as *prima facie* evidence, of the Commission's finding in the *Third Phoenix Case,* and thereafter the competency, and evidentiary value otherwise, of the showing made through Witness Reif.

(a) The Commission's finding in the Third Phoenix Case is partially invalid, under various Court decisions, and therefore incompetent and inconsistent in its entirety.

The direct finding of the Commission with respect to reparation, upon which the reparation order here in suit is predicated, appears near the conclusion in the opinion in the *Third Phoenix Case,* and so far as material here reads as follows (R. 25-26):

"* * * We further find that the assailed rates, minimum 60,000 pounds, from California points were, are, and will be unreasonable to the extent that they exceeded, exceed, or may exceed, respectively, the following, in cents per 100 pounds:

Prior to July 1, 1922, to Phoenix 79 cents from the southern California group and 81 cents from the northern California group and *to Bowie 83 cents from the southern California group and 93 cents from the northern California group; on and between July 1, 1922, and the effective date of the rates herein prescribed for the future, from the southern California group and the northern California group, respectively,* 66 and 66 cents to Yuma, 68 and 69 cents to Kingman, 71 and 73 cents to Phoenix, 73 and 77 cents to Prescott, Williams, Tucson, Flagstaff, and Clarkdale, *75 and 84 cents to* Winslow, Holbrook, Bisbee, *Bowie,* and Douglas, 77 and 87 cents to Safford, and 79 and 89 cents to Gallup, Clifton, and Globe * * *" (emphasis ours).

The Commission also, and at the same time, made formal findings (R. 26) with respect to the levels of the rates for the future, and in the orders accompanying the opinion (R. 28-36) required such rates to be published.

Even a superficial review of the opinion in the *Third Phoenix Case* will convince the Court that the Commission was there proceeding, upon the basis of what it referred to (R. 25) as the first comprehensive record upon the subject ever before it, to fix a complete and properly related structure of reasonable

rates, both past and future, from California producing points to all the principal Arizona destinations. The rates found reasonable for the past (i. e., for reparation purposes) were no less related to each other, having in mind the different distances to the various points (as shown in the decision itself: R. 22), and their competitive relationships, than were the corresponding rates prescribed for the future. Higher rates were therefore prescribed for the longer hauls to points in eastern Arizona, such as Globe, Clifton, Holbrook, Bowie, Bisbee, and Douglas, with somewhat lower rates to less distant points such as Clarkdale and Tucson, and still lower rates to Phoenix. Points to which the distances were approximately the same were grouped on the same rate-basis: e. g., Globe with Clifton, Bisbee and Douglas with Bowie, Tucson with Clarkdale. Phoenix, the capital and the largest city of the state, was treated more or less as a key point, particularly since the rates to Phoenix had *twice* been prescribed in comparatively recent cases; and the other rates were quite obviously graded, distances being duly considered, upon levels either higher or lower than the Phoenix rates. It is plain that the finding was carefully worked out so as to produce what the Commission considered to be a harmonious, consistent and correctly related rate-structure; and that no part of the finding, relating to any one point, could properly be dissociated from the rest and given separate effect. The very text of the finding demonstrates that no separate and individual finding as to any of the points involved, particularly the point involved in the instant case, was either made or in-

tended. All of the destinations covered by the finding were mentioned *in the same sentence,* and Bowie was grouped with four other points; in fact, such grouping was generally followed as to most of the destinations.

(1) The reparation finding is invalid and incompetent because predicated upon a demonstrated error of law.

The Court is now confronted with the fact that this finding, together with certain of the reparation orders issued pursuant thereto, has been declared void, because in excess of the Commission's jurisdiction, in so far as it attempted to award reparation upon shipments which moved to Phoenix, Globe, Stafford and Clarkdale. Such is the express legal effect of the decisions of the Supreme Court in the *Arizona Case,* of this Court in the *Wholesale Grocery Case,* and of the District Court for Arizona in at least one case involving shipments to Clarkdale: *T. F. Miller Co. v. A. T. & S. F. Ry. Co.,* No. L-824-Phoenix (decided April 15, 1933). No appeal was taken by the plaintiff in the case last mentioned, and the decision therein has become final.

These decisions established that the Commission, in making its reparation finding, proceeded upon a complete misconception and misapprehension of its powers under the law. Indeed, the Supreme Court expressly said, in the *Arizona Case* (284 U. S., at p. 389) that the Commission "in its report *confuses legal concepts",* and that "the Commission's *error* arose from a failure to recognize" the essential distinction between its legislative function of prescrib-

ing future rates, and its quasi-judicial function of awarding reparation. This Court, in the *Wholesale Grocery Case,* emphasized (68 F. (2d), at p. 604) the identity of origin of that case and the *Arizona Case,*

> "Because we are now being called upon to pass upon *a misconception of the Commission regarding its powers that has already been clearly pointed out* by the Supreme Court" (emphasis ours).

That misconception, as this Court has recognized, pervades the entire finding in the *Third Phoenix Case,* upon which plaintiff's suit here must depend. It invalidates that finding in its entirety, not merely as to the points where the rates were prescribed or approved in the *First Phoenix Case,* the *Graham Case,* the *Douglas Case*[5] and the *United Verde Case,*[6] but as to all points. It is inconceivable that the Commission, if it had realized at the time that it was barred by law from awarding reparation on shipments to Phoenix, Globe, Clarkdale, Safford, and (by a parity of reasoning) Douglas, would nevertheless have awarded such reparation on shipments to a related point, of approximately equal or even greater distance, such as Bowie. The whole decision shows that it was the Commission's intention to prescribe, for reparation purposes, a properly related and consistent adjustment, and not the chaotic rate-structure which would result if the finding were held valid as to

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5. *Douglas Chamber of Commerce, etc. v. A. T. & S. F. Ry. Co., et al.* (1921), 64 I. C. C. 405. A copy of the report and order is in evidence as Defendants' Exhibit C (R. 118-142).

6. *United Verde Ext. Mining Co. v. A. T. & S. F. Ry. Co.* (1924), 88 I. C. C. 5, in which the Commission found reasonable a rate of 86½ cents, on sugar from California points to Clarkdale, made effective Oct. 16, 1922 (R. 14-15).

Bowie, though determined to be legally invalid as to the other points named. The character of the discriminatory and disordered rate-adjustment which would thus result is graphically set forth on the chart hereto annexed as Appendix A, and is also illustrated by the following typical examples:

a. The rate from Southern California to Clarkdale, following Oct. 16, 1922, and until Jan. 12, 1924, which was found reasonable in the *United Verde Case,* was 86½ cents (R. 15). The contemporaneous rate to Bowie was exactly the same (R. 14-15). The distance to Clarkdale was about 563 miles; to Bowie, 634 miles (R. 22). If the reparation awarded on the four Bowie shipments moving during that period from southern California is eventually paid, the rate to Bowie will be retroactively reduced to 75 cents (R. 26, 37, 38), a reduction ranging from $69.00 to $116.00 per car; although no such reduction, nor any reduction at all, could lawfully be made upon exactly similar shipments moving from the same points of origin, over the shorter distance to Clarkdale. The report shows that it was the Commission's intention that the rates to Bowie, both for reparation purposes and for the future, should be somewhat higher than to Clarkdale, instead of substantially lower.

b. The rate from both the northern and southern California groups to both Phoenix and Bowie, after Sept. 17, 1921, and until July 1, 1922, was the same: 96 cents. The distances were as follows (R. 22): from the northern California group to Phoenix, 749 miles; to Bowie, 961 miles; from the southern California group to Phoenix, 467 miles; to Bowie, 634

miles. The distance from the northern California group to Bowie was computed over the route of the Santa Fe from Mojave, California, via Barstow, Cadiz, and Parker, to Phoenix, Arizona, thence via the Phoenix-Maricopa branch of the Arizona Eastern to Maricopa, and the main line of the Southern Pacific to destination. Upon that route, Phoenix was directly intermediate, and approximately 212 miles less distant than Bowie. If the reparation order here in suit is finally complied with, the rates charged on the shipment which moved from a northern California point to Bowie during the period specified will be retroactively reduced to 93 cents, and on the five shipments which moved during that period from southern California origins, to 83 cents: thus creating gross discriminations against Phoenix, at which point the contemporaneous rates could not be reduced through reparation. This discrimination is accentuated, as to the northern California shipment, by the apparent long-and-short-haul violation. The actual discrimination against Phoenix thus created amounts to $25.81 on the northern California shipment, and ranges from $84.29 to $105.35 per car on the southern California shipments (R. 37, 39). The actual routes of movement were practically identical, having been over the same lines as far as Maricopa, from which the branch-line haul to Phoenix was about 35 miles. The report shows (and plaintiff's witness Reif in effect conceded: R. 92) that it was the Commission's intention and purpose that the rates to Bowie should be substantially *higher,* instead of *lower,* than the corresponding rates to Phoenix.

(2) Because of the discriminations resulting from its enforcement, the reparation finding in suit is invalid, and of no force as evidence to sustain plaintiff's contentions.

The anomalous and incongruous results of the enforcement of the reparation order here in suit would be none the less discriminations, of the character contemplated and condemned by the Act, even though brought into being *retroactively,* by the enforcement of a quasi-judicial order, rather than by the carriers' voluntary act. The authorities establish that discrimination may be accomplished quite as effectively by the charging of equal amounts for similar services in the first instance, and the subsequent refund, either voluntarily or under judicial compulsion, of a portion of the charges for one service but not for the other, as by the initial charging of unequal amounts. This was precisely the situation involved in

Wight v. U. S. (1897), 167 U. S. 512,

in which the Supreme Court condemned, *as a discrimination,* a difference in treatment created by the initial charging of the same specified tariff rate to each of two similar and competing shippers, and the subsequent refunding, of a portion of the charges thus collected, to *one* of the shippers. It was said to be the purpose of the prohibition of discrimination, contained in Section 2 of the Interstate Commerce Act:

> "to enforce equality between shippers, and *it prohibits any rebate or other device by which two shippers* shipping over the same line and the same distance under the same circumstances of carriage *are compelled to pay different prices* therefor" (emphasis ours).

Discriminations of the same kind were involved in the situations discussed in:

Penn. R. Co. v. International Coal Co. (1913), 230 U. S. 184,

and

Mitchell Coal Co. v. Penn. R. Co., supra.

In the *Mitchell Case* it was specifically recognized that a discrimination might be created *retroactively*, by the awarding of reparation to one shipper but not to another, the Court saying (at p. 259):

> "For, if at the suit of one shipper, a court could hold a past rate or allowance to have been unreasonable and award damages accordingly, it is manifest that such shipper would secure *a belated but undue preference* over others who had not sued and could not avail themselves of the verdict" (emphasis ours).

To the same effect, see:

Texas and Pac. Ry. Co. v. Abilene Cotton Oil Co. (1907), 204 U. S. 426;

Phillips v. Grand Trunk Ry. Co. (1915), 236 U. S. 662.

An excellent discussion of the manner in which discrimination may be created by the subsequent refunding of a portion of the charges collected upon certain shipments, whereas no such refund is made upon others moving under similar conditions, and at the same rates, is found in:

Union Pac. Ry. Co. v. Goodridge (1893), 149 U. S. 680.

It is very clear that if the carriers created, or even *threatened* to create these discriminations *voluntarily,* rather than pursuant to the Commission's quasi-judicial finding, they would arouse instant protest and incur severe and deserved condemnation. Indeed, when exactly similar discriminations were maintained by the carriers, they were complained of by shippers and found unlawful by the Commission, which entered legislative orders for the future requiring their termination. Thus, in the *First Phoenix Case,* the Commission condemned the maintenance of a higher rate on sugar from California to Phoenix, then (1921) a branch-line point, than to Bowie and other main-line points in eastern Arizona, and ordered the Phoenix rates reduced to the main-line basis. Plaintiff's witness Reif asserted, in his testimony, that *this equalization was for the purpose of removing discrimination* between the main-line points and Phoenix (R. 92, 94). In the *Douglas Case,* Docket 11442, the Commission found unduly prejudicial the maintenance of higher rates on sugar and other commodities at Douglas than at Bowie (R. 120, 121, 133, 138) and by order (R. 142) required those rates to be maintained upon an equality.

The above analysis shows that the enforcement of the reparation award here in suit would create again precisely the discriminations found unlawful by the Commission, when of the carriers' creation. It should be borne in mind that the fundamental purpose of the Interstate Commerce Act is "to cut up by the roots every form of discrimination, favoritism, and

inequality", and to "place all shippers upon equal terms".

N. Y., N. H., & H. R. R. Co. v. I. C. C. (1906), 200 U. S. 361 (391);

United States v. Union Stockyard (1912), 226 U. S. 286 (307, 309).

That great purpose would be set at naught, and gross inequality of treatment would result, if the order in suit should be declared valid and enforceable.

It cannot be argued that unlawful discriminations acquire lawful status simply because they originate in a quasi-judicial mandate of the Commission. The several authorities above cited establish the contrary, and it is further made clear by other controlling decisions. The incongruous results of the enforcement of the awards, if unlawful when due to the voluntary acts of the carriers, would be equally so when created anew by giving partial effect to the reparation finding in suit. The controlling principle was recently stated by the Supreme Court, in forceful language, in:

Texas and Pac. Ry. Co. v. U. S. (1933), 289 U. S. 627 (637):

"Obviously, what the carrier may not lawfully do, the Commission may not compel."

The Court cited, among others, the following cases establishing the same principle:

S. P. Co. v. I. C. C., supra;

I. C. C. v. Diffenbaugh (1911), 222 U. S. 42 (46);

Ellis v. I. C. C. (1916), 237 U. S. 434 (445);
U. S. v. Illinois Central R. Co., supra,
Anchor Coal Co. v. U. S. (1927), 25 F. (2d) 462 (471-2).

(3) The acceptance of the reparation finding as valid prima facie evidence fails to recognize or give due effect to the controlling decisions in the Arizona and Wholesale Grocery Cases.

The acceptance of the Commission's finding as *prima facie* evidence, sufficient to support the findings and judgment of the trial Court, fails to recognize the controlling effect of the decisions in the *Arizona* and *Wholesale Grocery Cases.* The decision in the *Arizona Case* in substance holds that the 96½-cent rate from California points to Phoenix, prescribed in the *First Phoenix Case* in 1921, became *and continued to be,* until the further legislative order of the Commission, the conclusive measure of a reasonable maximum rate for that transportation service. Under the decision that rate was not subject to retroactive reduction during the effective period of the order in the *First Case.* That period continued until February 25, 1925, the effective date of the order in the *Second Phoenix Case:*

Phoenix Chamber of Commerce v. A. T. & S. F. Ry. Co. (1925), 95 I. C. C. 244.

In giving such conclusive effect to the Commission's legislative action in the *First Case,* the Supreme Court followed the consistent course of its own decisions, including those cited in the opinion (284 U. S., p. 386), and the following, among others:

Interstate Commerce Commission v. Union Pac. R. Co., supra;
Western Paper Makers' Chemical Co. v. U. S., supra;
A. T. & S. F. Ry. Co. v. U. S., supra;
Virginian R. Co. v. U. S., supra.

This Court, in the *Wholesale Grocery Case*, adopted and applied the rule of the *Arizona Case* to rates formally *approved* by the Commission, in effect if not in so many words declaring that such rates, by virtue of that approval, are conclusively established as reasonable rates, until thereafter changed *for the future* by the Commission, and meanwhile are not subject to retroactive reduction. Because of the findings in the *Graham Case*, and this Court's conclusions in the *Wholesale Grocery Case*, the sugar rates to Globe and Safford, in effect in 1922 and thereafter until 1928, became the conclusive measure of reasonable rates for the transportation services from California points to those destinations.

The same principle was followed and applied by the trial Court in passing upon the reparation claims involving shipments to Clarkdale. It is clear that the same principle likewise applies to the rates on sugar to Douglas, in effect following 1921, because of their approval as reasonable in the *Douglas Case*.

The trial Court, by following and giving effect to the Commission's reparation award here in suit, permits its decision to be guided, not by the *conclusive* tests afforded by these rates to Phoenix, Clarkdale, Douglas, Globe and Safford, but by some different

measure of reasonable rates to Bowie. In effect, the trial Court has said that although 96½ cents was the conclusive measure of a reasonable maximum rate from *all* points of origin in California to *Phoenix,* in 1922 and 1923, rates of 84 cents from northern California, and 75 cents from southern California, to Bowie were the highest possible reasonable and lawful rates for essentially similar, although substantially longer, hauls to the latter point; that although 96½ cents was also the conclusively just and reasonable rate from all California points of origin to Douglas, from 1921 until 1928, the highest possible lawful rates for essentially similar transportation services from the same points of origin over practically the same rails to Bowie were 93 cents from northern California, and 83 cents from southern California, prior to July 1, 1922; and 84 cents and 75 cents, from those groups respectively, after that date. Plaintiff's evidence establishes (R. 11-12) and defendants' showing confirms (R. 181) that the transportation to Bowie was over the same rails as to Phoenix, as far as Maricopa. The hauls to Bowie and Douglas were also quite similar, being over the same rails as far as Tucson, and under very similar conditions beyond that point (R. 11-12, 121). The trial Court's complete abandonment of the conclusive measures of reasonable rates, afforded by the prescribed or approved rates to Phoenix, Globe, Safford, Clarkdale, and Douglas, was in fact and effect simply a failure to give proper, or indeed any, weight to the essence of the decision in the *Arizona Case,* later adopted and ap-

plied both by this Court in the *Wholesale Grocery Case,* and by the District Court in its own decision in the Clarkdale suit.

We ask this Court to conclude that the Commission's reparation finding in the *Third Phoenix Case,* and the reparation order here in suit, are deprived of any value as *prima facie* evidence; and that the trial Court erred, *as a matter of law,* in according *prima facie* weight thereto in arriving at its findings and conclusions herein, because:

(1) The finding, and the resulting order, were based upon a fundamental misconception and misapprehension of the law;

(2) That fundamental error pervades the finding in its entirety; for in that finding the Commission treated *all* the rates, to *all* the points there involved, including those points where its jurisdiction has since been declared to have been erroneously asserted, as being interrelated and interdependent, and endeavored thereby to create a properly related and harmonious rate-structure covering all of those related destinations;

(3) The finding having been determined by controlling Court decisions to have been completely invalid as to certain of the destinations named therein, its enforcement as to other destinations, such as Bowie, will create retroactive discriminations, clearly violative of the spirit and intent of the Act, in excess of the Commission's powers thereunder, and wholly contrary to the obvious purposes of the Commission in the premises;

(4) To accord even *prima facie* effect to the finding, as a determination of reasonable rates to the destinations involved here, is to ignore and cast aside the controlling decisions in the *Arizona* and *Wholesale Grocery Cases,* and the trial Court's own final judgment in the Clarkdale suit.

(b) The showing attempted by plaintiff, apart from the finding and order in the Third Phoenix Case, was largely incompetent, and in any event wholly inadequate to support the trial Court's findings and judgment.

Plaintiff's evidence, other than the report in the *Third Phoenix Case* (Exhibit 1), the reparation order (Exhibit 2), and the Rule V statement setting forth the shipments (Exhibit 3), consisted principally of a tabular statement of rates and distances (Exhibit 4) introduced through plaintiff's witness Reif, over defendants' objection (R. 85), and the accompanying oral testimony of that witness (R. 85-94). Plaintiff also introduced, by agreed reference (R. 84), subject to objection by defendants on the ground of irrelevancy, the two reports of the Commission in:

> *Arizona Corporation Commission v. A. E. R. Co.* (1926), 113 I. C. C. 52; on rehearing (1928), 142 I. C. C. 61.

Although Exhibit 4 was introduced through Witness Reif, the record fails to show that it was prepared either by him personally or under his supervision, although it does indicate that it had been checked by him, "and found to be correct" (R. 85). Under these circumstances, it appears that the exhibit was not properly authenticated, and should have been

rejected as incompetent, in response to defendants' timely objection.

In any event, the exhibit is admittedly (R. 92) little more than a reproduction, with certain significant omissions as well as some immaterial additions, of the tabulation of destinations, rates and distances, which appears on page 178 of the opinion in the *Third Phoenix Case* (R. 22). The significant omissions are of the rates and distances to Phoenix, as well as all the distances from the northern California group to the several destinations. The additions include principally the rates prescribed in the *Third Case,* both for reparation purposes and for the future. All of these rates are set forth at pages 180 and 181 of the decision itself (R. 25-26). It may properly be said, therefore, that Exhibit 4 is nothing more than a reproduction of portions of the Commission's opinion; and if the exhibit has any value as evidence here, it is because it demonstrates that the Commission, in its decision, undertook to work out a carefully adjusted and properly related rate-structure, both past and future, covering all the important Arizona destinations. The exhibit plainly has no greater standing, *as evidence,* than the decision itself, for it adds nothing not already fully apparent therein. Standing by itself, therefore, it affords no support for the trial Court's findings and conclusions. To the extent that that Court relied upon Exhibit 4, it committed material error, for the exhibit is incompetent; or, if competent, it is subject to all the infirmities inherent in the reparation finding in the *Third Case.*

The oral testimony of Witness Reif contains the significant statement that the *class* rates from California to Bowie have been prescribed on a higher basis than to Phoenix, in view of the substantially longer hauls (167 to 212 miles) to Bowie (R. 92-93), and indicates the witness' opinion that the sugar rates should be similarly adjusted. But when the witness was asked how he could justify the 75-cent rate, found to be a reasonable maximum, for reparation purposes, on shipments during 1922 and 1923 from southern California to Bowie, whereas in the *First Phoenix Case* the Commission had prescribed 96½ cents from the same origin group, for the much shorter distance to Phoenix, he could only assert that in his opinion the record upon which the 96½-cent rate was predicated was incomplete (R. 92); and he expressly referred at the suggestion of plaintiff's counsel (R. 93-94), to the statement by the Commission itself in the *Third Phoenix Case* (R. 24-25), to the same effect, basing his opinion largely, if not entirely, upon that statement. This is precisely the attempted excuse which was so severely condemned by the Supreme Court in the *Arizona Case*. Moreover, apparently the witness was ignorant that the Commission itself said, in the order in the *First Phoenix Case* (Defendants' Exhibit B: R. 116):

> "and *full investigation* of the matters and things involved having been had" (emphasis ours).

Indeed, the witness admitted that his only knowledge of the *record* in the *First Case* was gained "by reading the decision, and seeing the exhibits". He knew

nothing of the evidence introduced by the defendants (R. 94).

Plaintiff's purpose in introducing the decisions of the Commission in the *Arizona Commission Case,* as revealed by the testimony of Mr. Reif (R. 90-91) was to furnish a measure of the reasonableness of the rates assessed upon its sugar shipments, by applying a percentage factor to the mileage scale of *first-class* rates prescribed between California and Arizona in that case (113 I. C. C. p. 66). The testimony shows that the result is in fact adverse to plaintiff's contentions, particularly as to the rates from northern California. This is of especial interest, because 15 of the 31 shipments upon which reparation is demanded originated at northern California points.

The prescribed mileage scale of first-class rates produces, for the average distance from the northern California group shown in Plaintiff's Exhibit No. 1 (961 miles), a rate of $2.99. In *Consolidated Southwestern Cases* (1927), 123 I. C. C. 203, the Commission prescribed commodity rates on sugar between points in the southwestern states (Arkansas, Louisiana, Oklahoma and Texas) made by applying 30 per cent to the *first-class* mileage-scale rates prescribed in the same case. Mr. Reif proposed to adopt that method of rate-making, using as a basis the prescribed first-class rates between Arizona and California, and disregarding entirely the fact, which the Commission has itself emphasized in many decisions, particularly in the opinion on rehearing in the *Arizona Commission Case* (142 I. C. C., at p. 66), that the southwest-

ern class scale is radically different from the California-Arizona class scale, and could not properly be transposed from the southwest to Arizona and California. However, even under the witness' computation, the rate on sugar from northern California to Bowie would be 90 cents (R. 91), whereas the rate *actually charged,* on shipments moving after July 1, 1922, was only 86½ cents, and the rate prescribed for reparation purposes but 84 cents. It is clear that if the proposed measure of reasonable rates suggested by the witness has any value, it supports findings and conclusions as proposed by defendants, so far as the rates from northern California are concerned, and does not support at all the trial Court's finding.

We ask the Court to conclude that plaintiff's evidence, apart from the finding in the *Third Phoenix Case* and the reparation order in suit, is to a large extent incompetent and, therefore, inadmissible, and in any event wholly inadequate *as a matter of law* to sustain or support the trial Court's findings and judgment.

3. **Defendants' evidence demonstrates conclusively that the rates as charged were not unreasonable.**

The defendants' affirmative showing, addressed to the issue of the reasonableness of the rates, consists primarily of two exhibits setting forth rate-comparisons (Exhibits F and G: R. 169-172), these exhibits being supplemented by the oral testimony (R. 166, 180-187) of Witness J. L. Fielding. Mr. Fielding is an experienced railroad traffic officer, whose qualifica-

tions were stipulated (R. 166). Various decisions of the Commission relating to rates on sugar and other commodities from California to Arizona were also offered by defendants and received in evidence (Exhibits A to D, inclusive: R. 95-165).

Exhibits F and G compare the rates charged, as shown upon the Rule V statement, and the rates which the Commission in the *Third Phoenix Case* undertook to find reasonable to Bowie, for reparation purposes, with rates from the same points of origin in California to other destinations in Arizona (Phoenix, Globe, Safford and Douglas) which the Commission prescribed or approved as reasonable in the *First Phoenix Case* (Defendants' Exhibit B: R. 106-117), the *Douglas Case* (Exhibit C: R. 118-142), and the *Graham Case* (Exhibit D: R. 143-165).

These comparisons are directly pertinent, and indeed afford the best possible tests of the reasonableness of the rates charged. Both the Commission and the Courts have held that a prime test of the reasonableness of a rate is to compare it with rates approved or prescribed by the Commission for application upon the same commodity, for similar hauls between related points, in the same territory.

Blackman, et al. v. A. C. & Y. R. Co., et al. (1918), 49 I. C. C. 649 (654):

> "One of the best tests of the reasonableness of rates under Section 1 is to compare the rates at issue with rates prescribed by this Commission or with rates established by the carriers with relation thereto."

Montgomery v. A. & S. Ry. Co., et al. (1928), 147 I. C. C. 415 (418):

"While comparisons with ratings established by the carriers are always of probative value in cases of this kind, the best comparisons are with ratings which have been prescribed by us."

Other decisions of the Commission to the same effect include:

Federated Metals Corp. v. Central R. R. Co. (1927), 126 I. C. C. 703 (709);

Illinois Electric Co. v. C. B. & Q. R. Co. (1928), 140 I. C. C. 63 (65).

In

Western Paper Makers' Chemical Co. v. U. S., supra,

the Supreme Court said (271 U. S., at p. 271):

"Prior existing rates, whether locals or such proportionate rates from a key point to points of destination as were made applicable to this particular class of traffic, or direct rates upon other commodities moving from similar points of origin, are proper matters for consideration in establishing new through rates."

In

Montrose Oil Refining Co. v. St. L. & S. F. Ry. Co. (1927), 25 F. (2d) 750,

the Court said (752-753):

"By comparing the charges for similar service and under similar conditions with the rates demanded and collected from the plaintiff, the Commission found the latter to be violative of the act

> in the respects complained of to the extent they exceeded 15.5 cents, and substantially, that the damage to the plaintiff resulted in the failure of the defendants to establish through routes and just and reasonable charges as provided in the act. Comparison of existing charges made under similar conditions has been recognized as a proper basis for fixing reasonable new rates. *Western Paper, etc., Co. v. United States,* 271 U. S. 268, 46 S. Ct. 500, 70 L. Ed. 941. It is inconceivable that this method may not be employed in determining whether a particular rate is reasonable or not, especially where, as here, none of the rates are attacked as being confiscatory. * * *."

The obvious reason for the acceptance of Commission-made rates as the best possible standard of comparison by which to judge other rates, is, of course, that a pronouncement by the Commission, approving or prescribing a particular rate as reasonable for future application to a particular service, constitutes that rate the *conclusive* measure of a rate or charge fulfilling the requirements of the Act. That principle is established by the controlling decisions of the Supreme Court, and particularly finds full recognition in the *Arizona Case.* In the instant case, these comparisons of Commission-approved or prescribed rates to directly related points in the same destination territory provide a showing ample to overcome the mere *prima facie* case made by plaintiff, even if it be assumed that the finding and order relied upon are jurisdictionally valid. The finding in the *Third Phoenix Case,* even if assumed to have been jurisdic-

tionally made, creates a mere rebuttable presumption in plaintiff's favor, sufficient to prevail only if no stronger opposing evidence is offered.

B. & O. R. Co. v. Brady, supra (288 U. S., p. 458);

Atlantic Coast Line R. Co. v. Smith Bros., supra (63 F. (2d) p. 748);

Blair v. C. C. C. & St. L. Ry. Co., supra (45 F. (2d) p. 793);

Southern Ry. Co. v. Eichler, supra (56 F. (2d) p. 1018).

Opposed to that *prima facie* presumption, defendants present the conclusive presumption that the prescribed and/or approved rates to these other directly related points were just and reasonable, because in conformity with formal findings operating for the future, made by the Commission in its legislative capacity. The reparation finding and order upon which plaintiff depends are inconsistent with the findings in which the compared rates were approved or prescribed. The former have merely *prima facie* effect; the latter are *conclusive.* Under established rules of evidence, the latter must prevail, and the initial presumption in plaintiff's favor, even assuming the reparation finding to have been jurisdictionally made, is completely rebutted and overthrown.

The rate to Phoenix, prescribed in the *First Phoenix Case,* affords a very direct comparison by which the reasonableness of the rates in issue may be judged. Bowie was more than 164 miles more distant in 1921-1923, over customary routes of movement from Cali-

fornia, than Phoenix (R. 169-172, 181), the routes being at the time identical as far as Maricopa (R. 181). Obviously, as Witness Fielding pointed out (R. 181, 185) a reasonable rate to Bowie should be *higher* than the corresponding rate to Phoenix; and the carriers would not be properly justified in assessing *lower* charges to Bowie. In the *First Phoenix Case,* the Commission directly held (R. 113-114) that no higher rates should apply at Phoenix than were applied at that time at main-line points east of Maricopa (including Bowie). Under the decision in the *Arizona Case,* the 96½-cent rate to Phoenix, prescribed in that case, was the *conclusive* measure, during the effective period of the order, of a reasonable maximum rate to Phoenix; and it therefore affords a *conclusive* measure of a reasonable rate to Bowie, for the entire period (to Feb. 25, 1925) that the finding and order continued in effect. The rates actually maintained at Bowie, after June 27, 1921, were lower than the rate to Phoenix thus prescribed, and thus certainly not unreasonable. The record shows (R. 14-15) that the rates to both Phoenix and Bowie, after September 17, 1921, and until February 25, 1925, were in fact the *same.* The rate-basis prescribed for reparation purposes was, however, *higher* at Bowie than at Phoenix (R. 26). It is clear that the rates to Bowie cannot properly be judged by any different standard than is used in determining the reasonableness of the rates to Phoenix. Since 96½ cents was *conclusively* reasonable at Phoenix, until 1925, the equal or lower rates charged upon the Bowie shipments from the same points were likewise conclusively reasonable.

The record likewise indicates (R. 120, 121, 123, 124) that the Commission has considered that the rates from California to Bowie and Douglas should be upon the same basis, the mileages being almost exactly the same (R. 22, 169-170, 172), and the routes identical as far as Tucson. A rate approved as reasonable for the transportation service to Douglas would therefore afford a proper measure of a reasonable rate to Bowie. The comparisons show that the rates charged on the Bowie shipments were in all instances equal to, or less than, the rate to Douglas approved in the *Douglas Case* (R. 169-170, 172). In point of fact, the rate charged on all plaintiff's shipments to Bowie, *after* July 1, 1922, was 10 cents *less* than the approved rate to Douglas.

The defendants' proposed appropriate findings of fact, conforming to their showing (Proposed Findings Nos. 13, 14, 15, and 16: R. 202-207), which findings were rejected by the trial Court (R. 207), and were thereupon made the subject of exceptions, and appropriate assignments of error (Assignments Nos. 13, 14, 15, and 16). We ask this Court to sustain these assignments, and to conclude that the trial Court, in failing to adopt the proposed findings, or other findings conforming to the *conclusive* proof made by defendants, has committed material error requiring the reversal of the judgment.

III.

THE TRIAL COURT ERRED IN ITS AWARD OF ATTORNEY'S FEE TO PLAINTIFF.

Apart from the major aspects of this case, we deem it desirable to call attention to a minor error which should be corrected. This error relates to the amount of the attorney's fees awarded as part of the plaintiff's costs in the trial Court.

Under the applicable statute (*Interstate Commerce Act,* Section 16-2), the plaintiff in a case of this character, if he *finally* prevails, may be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit. In its complaint (Paragraph IX: R. 7) plaintiff alleged that a reasonable fee to be allowed in this action would be $500.00, and prayed for the award of that amount. Plaintiff subsequently offered evidence (R. 188-192) respecting the services performed, and its counsel stated that a fee of 25 per cent of the total involved would in their opinion be reasonable. The trial Court found that 20 per cent of the total would be a reasonable fee (R. 197), and adopted a finding (No. XIII: R. 216-217) to that effect. Conforming to that finding, the judgment (R. 221-224), makes provision for attorney's fees amounting to $25.59, payable jointly by both defendants, plus $571.85, payable severally by the Southern Pacific: a total attorney's fee of $597.44, or $97.44 in excess of the amount alleged to be reasonable and prayed for in the complaint.

Defendants contend that plaintiff, and the trial Court, are bound by the allegations and prayer of the

complaint, no attempt having been made to amend the complaint at any stage.

In

Skym v. Weske Consolidated Co. (Cal., 1896), 47 Pac. 116 (118),

the Supreme Court of California held that a judgment awarding attorney's fees in excess of the amount prayed for in the complaint was erroneous to that extent, saying:

> "The court erred, however, in the allowance of $250.00 as an attorney's fee. * * * The allegation in the complaint is that $150.00 is a reasonable sum to be allowed for the foreclosure * * *, and no more than that sum can be allowed."

In

Wellington v. Midwest Ins. Co. (1923), 112 Kan. 687, 212 Pac. 892,

the Supreme Court of Kansas said:

> "Appellant contends that in plaintiff's petition he asked for $500.00 to be taxed as costs, for attorney's fees, and that the court on motion fixed the attorney's fees at $600.00, and appellant makes the point that plaintiff could not recover more than prayed for. We think this point good, and the judgment should be modified by reducing the attorney's fees from $600.00 to $500.00."

In

Brought v. Cherokee Nation (C. C. A. 8th, 1904), 129 Fed. 192,

the Court said (195):

> "Another point was made by counsel for the plaintiffs in error on the oral argument of the

> case, although it is not mentioned in the brief; the point being that the trial court erred in entering its judgment in awarding damages against the defendants for a greater sum than was prayed for in the complaint. This point seems to be well taken, and it appears upon the face of the record."

The judgment was accordingly modified, *with costs to the appellants.*

To the same effect, see also:

Wise v. Wakefield (1897), 118 Cal. 107;

Logan County v. Childress (1922), 196 Ky. 1, 243 S. W. 1038;

Mountain Timber Co. v. Case (1913), 65 Ore. 417, 133 Pac. 92.

Defendants duly excepted to the Court's finding respecting the proper amount of the attorney's fees (R. 197), and to the inclusion of attorney's fees in the judgment (R. 224) and assigned error with respect thereto (Assignments of Error Nos. 6, 23), those assignments being directed both to the awarding of *any* attorney's fees, and to the amount found reasonable.

We ask this Court to conclude that the trial Court erred in awarding the attorney's fee incorporated in the judgment, at least to the extent that it exceeds the amount demanded in the complaint, and, even if the judgment should be affirmed upon the major issues, to order it modified in this respect, with costs to appellants.

CONCLUSION.

The judgment from which the instant appeal has been taken should be reversed, because of three fundamental errors committed by the trial Court:

First, its erroneous recognition of the *Eagle Case* as the controlling authority upon the question of the Commission's jurisdiction to make the finding and order in suit: and its failure to recognize that that case was disapproved in principle, and in effect overruled, by the Supreme Court in the *Arizona Case*, and that the *Arizona Case* and the *Wholesale Grocery Case* are the controlling authorities:

Second, its error in according to the finding and order in suit even *prima facie* value as evidence: and its failure to recognize that the finding is based upon the *same* misconception of law, by the Commission, which invalidated the *same* finding, and the orders based thereon, when reviewed in the *Arizona* and *Wholesale Grocery Cases*, and that that error pervades the entire finding, and renders it of no evidentiary value in this suit: and

Third, its error in failing to recognize that the decisions in the *Arizona Case* and the *Wholesale Grocery Case* have conclusively determined the lawful measure of the reasonable rates to be charged, not only to the destinations directly involved in those cases, but also to the adjacent and related destination involved in the instant case.

We ask this Court to conclude that the trial Court erred, *as a matter of law*, in concluding, upon the undisputed facts, that the Commission had valid juris-

diction to make the reparation award here in suit; and to conclude further that, even if the Commission possessed such jurisdiction *in the abstract*, the finding and order here in suit, being predicated upon a demonstrated error of law by the Commission, afford no satisfactory evidence upon which to base the trial Court's finding and conclusion that the rates under attack were unreasonable or otherwise unlawful, and that the trial Court therefore erred because it adopted findings and conclusions unsupported by satisfactory evidence, and in fact opposed to the conclusive showing presented by defendants.

The judgment should be reversed, and the cause remanded with instructions to enter judgment for defendants.

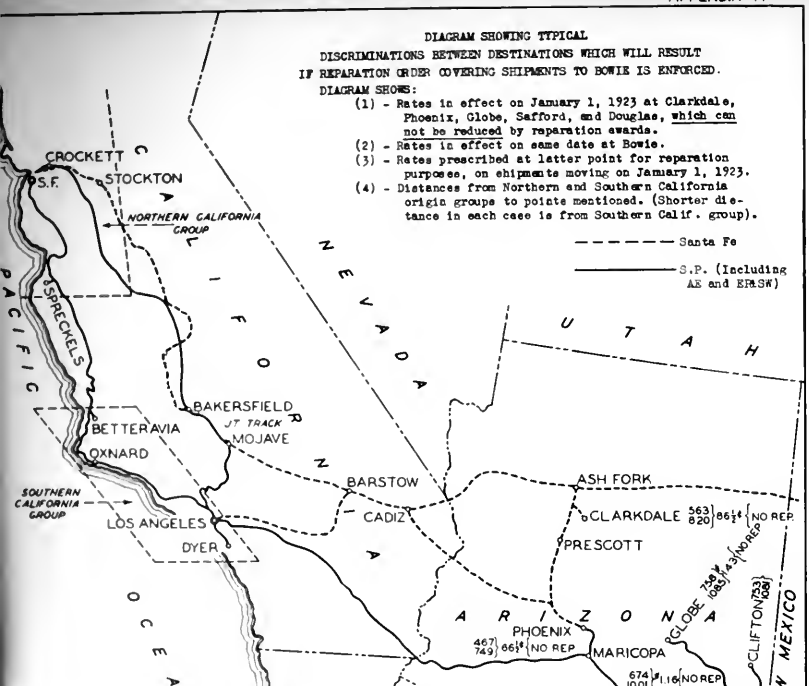
Respectfully submitted,

ALEXANDER B. BAKER,
LOUIS B. WHITNEY,
JAMES E. LYONS,
BURTON MASON,
Attorneys for Defendants and Appellants.

Dated, San Francisco, California,
September 26, 1934.

(Appendix Follows.)

Appendix.



NOTE. - Railroad lines shown are those in existence January 1, 1923.

Distances to Tucson and other points in Southeastern Arizona, from Northern California, are computed via Mojave, Barstow, Cadiz, Phoenix, and Maricopa, thence S.P. and connections to destination, as in the report of the Third Phoenix Case. That route was not open under the tariffs. Distances via actually used routes were substantially greater.

(a) - In Docket 11442, 62 ICC 412, the Commission prescribed a rate of 86-1 2¢ for the future, from all California points to Phoenix. The 86-1 2¢ rate shown represents this 86-1 2¢ rate, as reduced 10%, July 1, 1922. In the Arizona Grocery Case, 284 US 370, the Supreme Court held that no reparation could be awarded against rates maintained in compliance with the order in Docket 11442.

(b) - In Docket 14149, 81 ICC 134, the Commission found not unreasonable the current rates on sugar from all California points to Globe, Safford, and other Globe Branch points. The rates shown at those two points represent voluntary reductions below the basis approved. In the Wholesale Grocery Case, 68 F. (2) 601, the Circuit Court of Appeals held that no reparation could be awarded against rates equal to or less than those thus approved.

(c) - In Docket 14011, 88 ICC 5, the Commission found not unreasonable the current rate on sugar from all California points to Clarkdale. The 86-1/2¢ rate shown is the rate thus approved. In Miller Co. vs A.T.& S.F. Ry. Co., No. L-824 Phx, the U.S. District Court for Arizona held that no reparation could be awarded against the rate thus approved.

(d) - In Docket 11442, 64 ICC 405, the Commission found not unreasonable the current (1921) rate on sugar from all California points to Douglas. The 86-1/2¢ rate shown represents the approved rate, as reduced 10%, July 1, 1922. Under the rule of the Wholesale Grocery Case, no reparation can be awarded against rates lower than the rate thus approved.

No. 7342

IN THE

United States Circuit Court of Appeals

For The NINTH CIRCUIT

SANTA MARIA VALLEY RAILROAD COMPANY, ET AL.,

Defendants and Appellants,

v.

SOLOMON-WICKERSHAM COMPANY,

Plaintiff and Appellee.

BRIEF FOR APPELLEE.

FRED J. ELLIOTT,
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Attorneys for Plaintiff and Appellee.

THE MANUFACTURING STATIONERS INC. PHOENIX, ARIZONA

FILED
NOV 2 - 1934

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

No. 7342

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v.

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Plaintiff and Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The appellee will adopt in this brief the plan of the appellants, of designating the parties in the same manner as in the Trial Court.

In most respects the Statement of the Case appearing

in the brief of the defendants (pp. 1-9) is correct. There are, however, certain omissions and errors therein which should be called to the court's attention. They are briefly as follows:

The defendants refer to the decision of the Interstate Commerce Commission in,

> *Traffic Bureau, et al. v. A. T. & S. F. Ry. Co., et al.*, (1928), 140 I. C. C., 171 (R. 8-36),

as the "Third Phoenix Case". This was proper in the *Arizona Grocery Case* (49 Fed. (2) 563· affirmed 284 U. S. 370), where we were dealing with Phoenix rates. The reference is not appropriate here, however; we are now dealing with shipments to Bowie. This decision deals with rates to many destinations in Arizona (R. 8-36); and rates to Phoenix in no manner were singled out or was Phoenix dealt with as the principal or key point in arriving at what were reasonable rates, either for purposes of reparation or for the future. In other words, the decision deals with rates to Bowie and other points as much as to Phoenix. It would be more accurate and appropriate in the instant case to refer to it as the "Arizona Sugar Case".

We shall therefore, so as to avoid misleading the court as to the true effect of this decision, refer to it as the "Arizona Sugar Case".

On page 4 of their brief defendants refer to the Commission's decision in *Docket 6806, Arizona Corporation Commission v. A. T. & S. F. Ry. Co., et al, 34 I. C. C. 158.* Because of the importance which will attach to the date of this decision, we wish at this time to call the court's

attention to the fact that it was decided May 25, 1915, (R. 95). The order in this case was also issued May 25, 1915, (R. 104). It became effective August 15, 1915, (R. 104-105), and specifically provided that it would "continue in force for a period of not less than two years from the date" when it took effect, i. e. until August 15, 1917. (R. 105).

Finally the defendants attempt at page 9 to set forth plaintiff's position in the trial court. Some omissions are made in this regard, and we shall therefore set them forth in full. Plaintiff contended:

1. That the Commission in *Docket 6806* did not prescribe for the future the reasonable rates on sugar to Bowie; but

2. That even if the Commission had in this decision prescribed or approved the rates to Bowie, the effectiveness of that decision had been destroyed long before the decision of the Commission in the *Arizona Sugar Case* (140 I. C. C. 171), for two reasons: (a) the force and effect of *Docket 6806* and the order therein made expired August 15, 1917, two years after it became effective; and (b) because the subsequent changes in the rates destroyed the force and effect of the Commission's earlier approval. Thus the rates charged the plaintiffs were subject to reparation awards;

3. That the Commission's findings and awards with respect to reparation in the instant cases were jurisdictionally made and therefore valid;

4. That the findings and orders of the Commission in

the *Arizona Sugar Case* constituted *prima facie* evidence of the unreasonableness of the rates charged, and of the fact and amounts of the damage alleged to have been incurred by plaintiff, and of the other facts and findings therein set forth;

5. That this *prima facie* showing was further supported by other testimony introduced by plaintiff;

6. That the defendants failed to overcome the *prima facie* case of plaintiff; and

7. That plaintiff was entitled to judgment in accordance with the prayer of its complaint.

Otherwise than as above set forth the statement of the case submitted by defendants is correct.

BRIEF OF ARGUMENT.

I.

THE AWARDS OF THE COMMISSION UPON WHICH THE PRESENT CASES ARE BASED ARE VALID, AND THE COMMISSION POSSESSED JURISDICTION TO MAKE THE SAME.

1. The effectiveness of Docket 6806, decided by the Commission in 1915, and the Order therein made, expired in 1917.

The effectiveness of the decision in *Docket 6806* expired in 1917, under the provisions of the Commerce Act then in force.

> *Act to Regulate Commerce,* Sec. 15 (1 and 2); 34 Stat. L. 584; 41 Stat. L. 484, prior to amendment of February 28, 1920.

The Commission's order in *Docket 6806,* by referring

to the report and findings, made them a part of the order itself.

Arizona Wholesale Gro. Co. v. S. P. Co., 68 Fed. (2), 601.

The Commission can only act legislatively by formal order.

C. B. & Q. R. R. Co. v. Merriam and Millard Co., 297 Fed. 1;
American Sugar Rfg. Co. v. Del. L. & W. R. Co., 207 Fed. 733;
Brady v. I. C. C., 43 Fed. (2), 847, aff. 283 U. S. 804; 49 U. S. C. A., Sec. 15 (1).

It is the Commission's orders, not its reports and findings, which establish rates for the future; and it is the order, not the findings, which makes such rates conclusively just and reasonable, and free from reparation awards.

U. S. v. Atl., B. & C. R. Co., 282 U. S. 522; 75 L. ed. 513;
A. T. & S. F. Ry. Co. v. Arizona Gro. Co., 49 Fed. (2), 563; affd:
Arizona Gro. Co. v. A. T. & S. F. Ry. Co., 284 U. S. 370;
Eagle Cotton Oil Co. v. So. Ry. Co., 51 Fed. (2) 443.

Cases cited by defendants do not sustain their position, but on the contrary these cases all point out that the Commission can only act and give effect to its findings through orders.

Am. Sugar Ref. Co. v. D. L. & W. R. Co., 207 Fed. 733;
C. B. & Q. R. Co. v. Merriam, 297 Fed. 1;

U. S. v. A. B. & C. R. Co., 282 U. S. 522;
Western Paper Makers' Chem. Co. v. United States, 271 U. S. 268;
Vir. R. Co. v. United States, 272 U. S. 658;
S. P. Term Co. v. I. C. C., 219 U. S. 498;
Brady v. I. C. C., 43 Fed. (2) 847; affd: 283 U. S. 804.

2. **Changes made subsequently in the rates found not unreasonable in Docket 6806 destroyed any Commission-made (or approved) character which such rates theretofore might have possessed.**

The first increase of 25% in the rates found not unreasonable in *Docket 6806* was made by order of the Director General.

History of Rates, see Record, p. 167.

The Director General's order was not equivalent to an order of the Commission. In fact such order was carrier-made in character and subject to examination and change by the Commission.

Sec. 10, *Federal Control Act*, 40 Stat., 456;
No. Pac. Ry. Co. v. No. Dak., 250 U. S. 135;
Mo. Pac. R. Co. v. Ault, 256 U. S. 554.

The Director General's order No. 28 should be treated as if it was action taken by a carrier subject to the Act. This being true, the rate thereafter became carrier-made, and subject to reparation.

Dir. Gen. v. Viscose, 254 U. S. 498;
A. T. & S. F. Ry. Co. v. Arizona Gro. Co., 49 Fed. (2), 563.

3. Summary of Part I of Argument.

The Commission has jurisdiction as the administrative tribunal created by the Commerce Act to find that rates which have been charged by railroads for the interstate transportation of property in the past have been unreasonable or otherwise unlawful, and to make awards of reparations to shippers for the exaction of charges on their past shipments under such unlawful rates.

Sec. 8, Sec. 9; Sec. 13 (1), and Sec. 16 (1), 49 U. S. C. A.

T. P. Ry. Co., v. Abilene Cotton Oil Co., 204 U. S. 426; 51 L. ed. 553;

L. & N. R. Co. v. Sloss Sheffield Iron Co., 269 U. S. 217; 70 L. ed. 242;

Mills v. Lehigh Valley R. R. Co., 283 U. S. 473; 59 L. ed. 1415;

Meeker v. Lehigh Valley R. R. Co., 236 U. S. 412; 59 L. ed. 645.

The rates charged on shipments involved in the instant cases were not rates which had been fixed or approved by the Commission as just and reasonable. Being carrier-made, the Commission's awards of reparations are valid and should be enforced.

Arizona Gro. Co. v. A. T. & S. F. Ry. Co., 284 U. S. 370, 390.

II.

THE TRIAL COURT IN THE INSTANT CASE FOUND THE RATES CHARGED PLAINTIFF WERE UNREASONABLE AND THAT PLAINTIFF IS ENTITLED TO RECOVER REPARATIONS FROM THE DEFENDANTS. THIS DECISION OF THE TRIAL COURT SHOULD BE APPROVED.

1. **The Commission's determination of the unreasonableness of the rates charged was conclusive on the Trial Court.**

When the Commission in *Docket 16742*, determined that the rates charged plaintiffs were unreasonable, this became conclusive on the Trial Court in the present cases.

So. Car. Asparagus Growers Assn. v. So. Ry. Co., 64 Fed. (2) 419.
Glenn Falls Portland Cem. Co. v. D. & H. Co., 66 Fed. (2) 490.

Any other rule would destroy the principle of uniformity of rates required under the Act.

Mitchell Coal & Coke Co. v. P. R. Co. 230 U. S. 247;
Baltimore & O. R. Co. v. Brady, 288 U. S. 448.
Texas & P. R. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426.

The proof on the questions of the fact, and amount of damage to plaintiff, was clear, convincing and undisputed.

Record, 83 ,84, 37, 38, 39, 41, 42.

2. **Whether a rate is reasonable or unreasonable is a question of fact. The report and findings in Traffic Bureau, et al, v. A. T. & S. F. Ry. Co., 140 I. C. C. 171, and the awards of reparation made in favor of the Plaintiff constituted a prima facie case before the Trial Court, which the defendants failed to overcome. The decision of the Trial Court being supported by substantial evidence, is therefore conclusive on appeal as to this question of fact.**

Whether a rate is reasonable or unreasonable is a question of fact, not one of law.

Ill. Cent. R. R. Co. v. I. C. C. 206 U. S. 441;
T. P. R. Co. v. I. C. C. 162 U. S. 197;
Cin. N. O. & T. R. Co. v. I. C. C., 162 U. S. 184.

Where actions are tried by the court without a jury, the judgments of the Trial Court, if supported by substantial evidence, are conclusive on appeal; and the evidence must be considered in a light most favorable to appellee.

United States v. Linde, 71 Fed. (2), 925;
Victor Talking Machine Co. v. George, 69 Fed. (2), 871.
Mandel Bros. v. Henry A. O'Neil, Inc. 69 Fed. (2), 452;
Aberly v. Craven Co., 70 Fed. (2), 52;
Bayless v. Gage, 69 Fed. (2), 269;
Kurecki v. Buck, 71 Fed. (2), 227.

The evidence introduced in support of plaintiff's complaint is substantial, and ample to support Trial Court's findings and conclusions.

Traffic Bureau v. A. T. & S. F. Ry. Co., 140 I. C. C. 171.

Record, pp. 83-94.

Report, findings and awards, in *Docket 6806* were "prima facie evidence of the facts therein stated."

49 U. S. C. A., Sec. 16 (2).

Partial invalidity of *Docket 16742* as to Phoenix, Clarkdale, and Globe, did not destroy its validity to other points under consideration.

Spiller v. A. T. & S. F. Ry. Co., 253 U. S. 117, 132.

Comparison of rates to Phoenix or other points was not conclusive upon Trial Court in determining unreasonableness of rates on shipments in question.

Advances in Rates, Western Case, 20 I. C. C., 307, 309.
I. C. C. v. Chicago Gr. R. Co., 141 Fed. 1003, 1008. Aff: 209 U. S. 108;
City Coal Co. v. New York, 123 I. C. C. 609;
Dallas Paper Co. v. T. & N. R. Co., 132 I. C. C. 59;
Peabody Lbr. Co. v. Penn. R. Co., 132 I. C. C. 741;
Railway Exp. Agency v. United States, 6 Fed Supp. 249;
Traffic Bureau v. A. T. & S. F. Ry. Co., 140 I. C. C. 171.
Jones v. Alton & S. R. Co., 6 Fed. Supp. 807.

The defendants having failed to introduce the evidence presented to the Commission in *Docket 16742*, such findings are conclusive and cannot be assailed upon appeal.

Miss. Val. Barge Co. v. United States, decided April 30, 1934, 290 U. S. .....
Jones v. Alton & S. R. Co., 6 Fed. Supp. 807.

As previously stated, the only question with which this court can be concerned is whether there was any substantial evidence to support the findings of the trial court.

Kurecki v. Buck, 71 Fed. (2), 227, 229;
United States v. Alger (C. C. A. 9th), 68 Fed. (2), 592, 593;
So. Ry. Co. v. Blue Ridge Power Co., 30 Fed. (2), 33, 40;
United States v. Dudley, 64 Fed. (2), 743.

3. The question of discrimination is not properly before this court, and in any event is not an issue that can be raised by defendants.

The defendants having failed to assign as error the matter of discrimination, it is not before this court for review.

Louie Share Gan v. White, 258 Fed. 798;
Wight, et al, v. Washoe Co., 251 Fed. 819.
Behn Meyer Co. v. Campbell, et al, 205 U. S., 403.

The question of prejudice and discrimination is not one that can be raised or complained of by defendant carriers.

I. C. C. v. Chicago, R. I. & P. Ry. Co., et al, 218 U. S., 88, 109.

4. No error occurred in the introduction of evidence before the Trial Court.

The fact that some evidence conflicts with other evidence does not make it incompetent. The weight and credibility of witness is a question to be passed upon by the Trial Court.

Cyc. on Fed. Procedure, vol. 2, 709.

In any event, erroneous admission of evidence in cases tried by a court sitting without a jury is not grounds for reversal, especially where there is sufficient competent evidence to sustain its findings.

South Fork Brewing Co. v. United States, 1 Fed. (2), 167; cert den. 266 U. S. 626.
Cascaden v. Bell, 257 Fed., 926;
Lackner v. McKechney, 2 Fed. (2), 516;
Hall v. United States, 267 Fed., 795;
Gardner v. United States, 71 Fed. (2), 63 (9th C. C. A.).

There was sufficient evidence before the *Trial Court* to sustain its findings and decisions.

Docket 16742, Record 83, 84, 8-40.
Awards of Reparation, Record 40-41.

III.

The Trial Court correctly assessed attorneys fees

49 U. S. C. A., 16 (2).

Mellon v. World Pub. Co., 20 Fed. (2), 613.

ARGUMENT.

FOREWORD.

Although defendants assert several Assignments of Error (Defendants' Brief, pp. 9-13), and their brief in support thereof deals with many contentions and alleged errors of the trial court, nevertheless the entire argument of defendants can be summarized under two major headings:

First, that the rates charged plaintiff on its shipments upon which reparation was allowed, were conclusively just and reasonable by reason of a decision of the Interstate Commerce Commission, decided May 25, 1915, appearing in *34 I. C. C. 158,* and known as *Docket 6806,* and therefore the reparation awards to plaintiff are unlawful by reason of the *Arizona Grocery Case,* (284 U. S. 370), and the *Arizona Wholesale Case,* (68 Fed. (2), 601); and

Second, that if the Commission had authority to award reparation upon the shipments in question, the trial court erred in not rendering judgment for the defendants upon the evidence introduced at the trial of this case.

This is summarized more or less in the same manner by the defendants in their brief, in the foreword beginning at page 25, and in the conclusion to their argument beginning on page 102.

All of the points discussed by defendants fall under one

or the other of these two main heads. While plaintiff in this brief has not attempted to deal separately with each of the many subtopics of defendants' brief, all of the matters essential to the determination of these cases by the court are considered herein. We are certain the court will be convinced that no prejudicial error occurred at the trial of this case, that the appeal should be dismissed, the findings of fact and conclusion of law of the District Court approved, and the judgment rendered thereon affirmed.

I.

THE AWARDS OF THE COMMISSION UPON WHICH THE PRESENT CASES ARE BASED ARE VALID, AND THE COMMISSION POSSESSED JURISDICTION TO MAKE THE SAME.

1. The effectiveness of Docket 6806, decided by the Commission in 1915, and the order therein made, expired in 1917.

Defendants labor hard from pages 26 to 35 inclusive of their brief, in order to show that the Commission *by its decision* in Docket 6806 (decided in May, 1915), approved the rates on sugar to Bowie, the destination here involved. For reasons elsewhere set forth in our brief, the effectiveness of this decision expired in 1917, and it is therefore immaterial whether the Commission in its decision approved such rates or not. In fact we shall later show that the more the Commission effectively passed on them for future application (i. e. acted on such rates legislatively) the more effectively they expired in 1917, as Commission approved or prescribed rates. We shall, for this reason, not spend any time on this point.

There is one vital reason why *Docket 6806,* and the Order made therein, are not controlling in the present cases. Whatever force and effect they had upon the rates to Bowie expired in 1917; that is, two years after the order was made.

For the convenience of the court we set forth herewith the pertinent portions of the *Commerce Act* which were in effect at the time *Docket 6806* was decided and the order therein made:

> "Whenever, after full hearing of a complaint . . . the Commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this Act for the transportation of persons or property . . are unjust or unreasonably or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged . . , *and to make an order* that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation . . in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

> "All orders of the Commission, except orders for the

payment of money shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, *not exceeding two years,* as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission or be suspended or set aside by a court of competent jurisdiction." (Emphasis supplied)

Act to Regulate Commerce, Sec. 15 (1 and 2); 34 Stat. L. 584; 41 Stat. L. 484; prior to Amendment of February 28, 1920.

The amendment of 1920 removed the two-year limitation, and provided that all orders of the Commission should "continue in force until its further order, or for a specified time, according as shall be prescribed in the order", *49 U. S. C. A., 15 (2).* The decision of the Commission which fixed 96½c as the maximum rate to Phoenix, and which was involved in the *Arizona Grocery Case,* was decided *June 22, 1921,* (R. 138), more than a year after the amendment removing the two-year limitation had been passed.

It is therefore clear that *Docket 6806* and the *First Phoenix Case* are not analagous. The effectiveness of each must be considered in the light of the Act in force at the time each decision was rendered. This should be borne in mind throughout the entire argument which follows.

Defendants state that they do not rely upon the order in *Docket 6806;* that their defense is based upon the findings in that case.

In passing, and before showing that the cases of *Arizona Gro. Co. v. A. T. & S. F. Co., 284 U. S. 370,* hereinafter referred to as "Arizona Grocery Case", and *Arizona Wholesale Gro. Co. v. S. P. Co., 68 Fed. (2) 601,* hereinafter referred to as "Wholesale Grocery Case", make this position entirely untenable, let us examine the statement of the defendants:

> "It should be noted that defendants do not rely at all upon the *order* made in Docket 6806. Their defense is based upon the express *finding* there made by the Commission, particularly as that finding was addressed to the rate made effective, during the pendency of the case, to Bowie. The Commission's *order* in Docket 6806 (R. 104-105) related entirely to rates *for the future* to *Phoenix* and *Prescott,* neither of which points is involved as the destination of any of plaintiffs' shipments. While the order refers to and by such reference includes the opinion, the context makes it clear that this reference was merely for the purpose of affording proper support, through an express finding of fact, for the affirmative order respecting the future rates to Phoenix and Prescott. No affirmative *order* was made, dealing with the rates to Bowie; and the *finding* contained in the opinion, relating to the rates to that point, was therefore not an essential part of the order, as made."
>
> (Appellant's brief, p. 46, 47).

The order in Docket 6806 in this regard is identical with the order in the case of *Graham and Gila County Traffic Assn. v. Arizona Eastern R. Co., et al, 40 I. C. C. 573,* considered by this court in the Wholesale Grocery Case (R. 163-165). There also, no *affirmative order*

was made dealing with the reasonableness of sugar rates to Globe. In the Wholesale Grocery Case the shipper contended that no order had been made, no legislative action taken, on the question of sugar rates to Globe. The court, however, on this question said:

> "The appellant argues earnestly that the *order* in the Graham Case is silent as to the reasonableness of the rates to Globe, and that therefore the commission cannot be understood to have taken any 'legislative action on the question of reasonableness of rates for the future'. Two short answers may be made to this contention. First, the order in the Graham Case specifically, as we have seen, makes the report a part thereof; and in the report the question of unreasonableness is treated. Second, the Supreme Court, in the Arizona Grocery Case, has *recognized essential unity of a report and an order promulgated by the commission.*" (Emphasis supplied).
>
> 68 Fed. (2), 601, 609.

It is therefore apparent that the Wholesale Grocery Case established the principle that the Commission by such reference makes the report part of the order. It would seem to follow that when the order becomes inoperative, so likewise would the findings which have been made a part of it become inoperative.

The cases uniformly hold that the Interstate Commerce Commission can only act legislatively by formal order.

> *Chicago, B. & Q. R. R. Co. v. Merrian & Millard Co.*, 297 Fed. 1.

In this case the Court, on page 4, said:

> "Section 15 of the Interstate Commerce Act (Comp. St. Par. 8583) required that any change of the rates made by the Commission should be made, not by a report, finding, or opinion, but by an order to the carrier to cease and desist from collection of the rate, to take effect not less than thirty days after the date of the order."

Also,

American Sugar Rfg. Co. v. Delaware L. & W. R. Co., 207 Fed. 733; and
Brady v. I. C. C., 43 Fed. (2), 847, aff. 283 U. S. 804.

Both of the last cases are cited in Defendant's brief, p. 49 and 51.

See also the Act itself, Section 15 (1).

This is again made clear by a case cited by defendants on page 48 of their brief.

U. S. v. Atl. B.& C. R. Co., 282 U. S. 522, 75 L. ed. 513-518.

In this case the court said:

> "The action here complained of is not in form an order. It is part of a report—an opinion as distinguished from a mandate . . Such action is directory as distinguished from mandatory. No case has been found in which matter embodied in a report and not followed by a formal order has been held to be subject to judicial review."

It is utterly absurd for the defendants to insist that the Arizona Grocery Case sustains their contention in this regard, or that it in any degree overrides the *Eagle Cotton*

Case (51 F. (2) 443). We appreciate that this court is entirely familiar with the decisions of this court and the Supreme Court in the *Arizona Grocery Case*, but at the expense of repetition we shall consider fully these decisions. In doing so we believe the court will have no difficulty in quickly disposing of the absurd position of defendants.

First let us look at the decision of this court. Judge Wilbur in rendering this decision, and in finding the rates of the carriers to be commission-made, dealt only with the "order" in the First Phoenix Case. This is clear from the following excerpts from that opinion:

> " . . fixed in its previous *order* as a just and reasonable rate",
>
> " . . . its *order* fixing a maximum rates was in legal effect a determination by the Commission in its administrative or quasi-legislative capacity",
>
> " . . . that the *order* of the Commission amounted to a decision that the rates fixed by the carriers below the maximum it had established were just and reasonable",
>
> "Otherwise, it would be absurd to provide that the carrier should thereafter be compelled to conform to the *order* of the Commission";
>
> "It is true that the original *order* is not res judicata, but its effect is quite as final, it is a legislative fiat;"
>
> "For where the rate is one *fixed* by law it is not excessive in any legal sense;"
>
> " . . . rates *established by the legislative power*,"

and other similar references too numerous to mention.

This entire line of reasoning was followed by Justice Roberts in his opinion written in the Supreme Court. He considered at length the legislative history of the function of rate making by the Interstate Commerce Commission, pointing out that originally,

> "No authority was granted *to prescribe* rates to be charged in the future. Indeed after a *finding* that an existing rate was unreasonable the carrier might put into effect a new and slightly different rate and compel the shipper to resort to a new proceeding to have this declared unreasonable."
>
> 284 U. S. 370, at page 385.

That is, there could be no commission-made rate originally because no order pertaining to the future could be issued by the Commission. Continuing,

> "Under the Act of 1887, the Commission was without power either to *prescribe* a given rate thereafter to be charged, or to set a maximum rate for the future, for the reason that so to do *would be to exercise a legislative function not delegated to that body by the statute.*"
>
> "The Hepburn Act and the Transportation Act evince an enlarged and different policy on the part of Congress. The first granted the Commission power to fix the maximum reasonable rate; the second extended its authority to the prescription of a named rate, or the maximum or minimum, or maximum and minimum rate . . When under this mandate the Commission *declares* a specific rate to be reasonable and lawful rate for the future *it speaks as the legislature,*

and its pronouncement has the force of a statute." (Emphasis supplied).

284 U. S., at page 386.

It was by these two Acts, referred to by Justice Roberts, that the Commission was granted the power and authority to issue *orders* pertaining to the future. Without the power to issue an order the Commission's findings and reports had no effect for the future, and could not be considered legislative in character. It is therefore clear that the Commission can only act in its quasi-legislative capacity through an order. The *Arizona Grocery Case* and the *Wholesale Grocery Case* dealt only with the legislative power of the Commission in fixing rates. They were not concerned with the statutory requirement compelling the Commission to make reports and findings before making the order.

Looking again at Justice Robert's opinion, this is apparent:

> "The report, and order of 1921 involved in the present case declared in terms that 96.5 cents was, and for the future would be, a reasonable rate. *The legal rate thus established became by virtue of the Commission's order also a lawful, that is, a reasonable, rate.*" (Emphasis supplied). (Page 387).

It is "*by virtue of the Commission's order*", not by virtue of the report or findings, that a rate prescribed by the Commission becomes lawful. In other words, in the present cases, after the effectiveness of the order in Docket 6806 expired in 1917, (i. e. in two years) by virtue of the

Commerce Act then in effect, the rate or rates so prescribed or approved, either directly or by reference to the report, ceased to be any longer conclusively just and reasonable rates, and they were thereafter subject to reparation orders of the Commission.

The question here being discussed, it seems to us, is absolutely and finally decided by the following and concluding excerpts from Justice Robert's opinion:

> "The Commission's error arose from a failure to recognize that *when it prescribed* a maximum reasonable rate for the future it was performing a legislative function, and that when it was sitting to award reparation it was sitting for a purpose judicial in its nature. In the second capacity, while not bound by the rule of *res judicata,* it was bound to recognize the validity of the rule of conduct prescribed by it and not to repeal its own enactment with retroactive effect. *It could repeal the order as it affected future action,* and substitute a new rule of conduct as often as occasion might require, but this was obviously the limit of its power, as of that of the legislature itself."
>
> (Emphasis supplied). (Page 389.)

The plaintiff is at a loss to see how the defendant carriers get any solace whatsoever out of the *Arizona Grocery Company Case* on this phase of their argument. There is nothing in either the Circuit or the Supreme Court decisions substantiating their position; but quite the contrary, these decisions support the plaintiff in its contentions that it is the order, not the findings, which make a rate conclusively just and reasonable, and free from subsequent reparation awards.

We submit that *Section 15 (1)* of the Act as it read prior to 1920, the *Eagle Case, (Eagle Cotton Oil Co. v. A. G. S. R. Co.* 51 Fed. (2) 443, *the Wholesale Grocery Case,* and the *Arizona Grocery Case,* dispose entirely, completely and effectively of the argument of the defendant carriers that the Commission was without jurisdiction to make the awards upon which the instant suits are based.

The rates charged the plaintiffs were a part of (as Justice Roberts described them) "the great mass of rates" which are carrier-made rates, and "as to which the Commission may award reparation". The carriers have not had the temerity to suggest in these cases that they were bound under pain of penalty to comply with the report and order of the Commission in Docket 6806 after the expiration of the two years provided in the statutes. Not being longer bound by the report and order, and being free to fix their own rates on plaintiff's shipments, such rates became and remained carrier-made, not commission-made. The carriers would have the shippers bound by the findings although they *were not.* Their commission-made character expired in 1917, long before the plaintiff's first shipments upon which reparation was awarded, moved. It is the order which gives the report and findings legislative effect. It is wholly illogical to insist, as do the defendants, that the findings remain effective although the order which makes them effective expired. No cases cited by defendants in their brief sustain such an absurd contention.

In discussing this point, the defendants urge that there is a difference between the Commission's orders and re-

port and findings. That can be readily admitted, but such distinction does not alter the correctness of the ruling in the *Eagle Cotton Oil Company Case* (51 Fed. (2) 443), holding that prior to 1920 a rate order of the Commission expired by limitation in two years. We believe all of the cases cited by the defendants establish the principle that the Commission can only act in a legislative manner, i. e., exercise its administrative functions concerning rates for the future by orders, not findings. See:

Amer. Sugar Ref. Co. v. D. L. & W. R. Co., 207 Fed. 733;
C. B. & O. R. Co., v. Merriman, 297 Fed 1;

both cited on page 51 of Appellants' brief; and

U. S. v. A. B. & C. R. Co., 282 U. S. 522;

cited on pages 48 and 49 of Appellants' brief. The last case goes so far as to say:

> "No case has been found in which matter embodied in a report and not followed by a formal *order* has been held to be subject to judicial review." (Page 527).

How, if the report and findings are not subject to judicial review, can they be said to establish rates? We hardly believe our opponents would care to establish the principle that the Commission might prescribe rates by findings which would not be subject to judicial review.

Other cases cited by defendants on this point do not sustain in any manner their position. For example, *Western Paper Makers' Chem. Co. v. U. S., 271 U. S. 268,* cited page 54 of Appellants' brief.) They quote an excerpt from this opinion dealing with findings of the Com-

mission, but the real question before the court was the order issued by the Commission after the findings had been made. This is apparent from the opening sentence of the opinion, which reads:

> "This suit . . was brought . . to enjoin in part, and to modify, certain *orders* of the Commission."

This case lends no support to the argument of the defendants, that it is the finding which establishes the rate. Quite the opposite, it shows that it is the Order which makes the findings effective.

To the same effect is another case, *Vir. R. Co. v. U. S., 272 U. S. 658,* cited on page 55 of their brief. The suit involved the order of the Commission, as evidenced by the following statement on page 662, by Justice Brandeis:

> "This suit was brought by the Virginian against the United States, the Interstate Commerce Commission, and the Chesapeake and Ohio, in the federal court for the Southern District of West Virginia, *to enjoin the enforcement of the Order and to set it aside.*" (Emphasis supplied).

If the findings of the Commission have the force and effect insisted upon by our opponents, why then are all these actions which are brought by other railroad carriers directed at the orders, not the findings? In fact, one of the cases cited by them, *U. S. v. A. B. and C. R. Co. (supra),* stated no action could be taken against the findings.

Not a single case cited by defendants in their brief holds that the Commission establishes rates by its findings; but on the contrary, they uniformly hold that rates

can only be established by the orders of the Commission.

An examination of Section 14 of the Transportation Act relied upon by defendants proves the error of their own contention. This section reads:

> "*Reports of investigations by Commission.* Whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, *together with its decision, order, or requirement in the premises;* and in case damages are awarded such report shall include the findings of fact on which the award is made."
>
> 49 U. S. C. A., Title 49, Sec. 14.

It is apparent from this section that Congress simply intended that no order be issued by the Commission as a result of an investigation without the Commission also making a report stating its conclusions, i. e., basis for its order. This court in the *Wholesale Grocery Case* recognized "*the essential unity* of a report and an order promulgated by the commission", and cited the decision of the Supreme Court in the *Arizona Grocery Company Case* as authority. (Page 609, 68 Fed. (2) 601). The argument of the defendants in the present cases ignores entirely this principle of unity.

The carriers cite *Southern Pacific Company v. Interstate Commerce Commission, 219 U. S. 433* (pages 52 and 53, Appellants' Brief), and state that one of the questions directly presented and passed upon in this case was whether the limitation applied to the Commission's findings as well as to its orders. *The question involved in*

this case is the validity of an order of the Commission. The portion of the opinion quoted by defendants sets forth the two reasons why the court did not consider the questions involved moot, although the two-year period had expired. These were:

First, the possible liability for reparation to which the railroads might be subjected if the legality of the order were not determined; and second, the influence and effect which the existence of "*the rate fixed for two years*", if legal, would have upon the exercise by the railroads of "*their authority to fix just and reasonable rates in the future.*" The second reason given by the court clearly points out that the rate is only Commission-made; that is, fixed by the Commission during the two-year term of the order; and that thereafter the rate is carrier-made, that is, fixed by the carriers. This is likewise true of another case cited, *S. P. Term. Co. v. I. C. C., 219 U. S. 498,* (page 53 of Appellants' Brief). Both of these cases just mentioned were dealing with the effect of the order, not the report and findings of the Commission. Nothing in either of these decisions holds that the rates fixed prior to 1920 by the Commission or the findings thereon are binding upon shipper or carrier after the expiration of the two-year period.

In the case of *Brady v. I. C. C., 43 Fed. (2) 847, affirmed in 283 U. S. 804,* cited and quoted from at length on pages 49 and 50 of Defendants' brief, the ineffectiveness of the findings of the Commission is clearly set forth. The court, among other things, said:

"An order of the Commission is analagous to the

judgment of a court, and it is well settled that the findings upon which a judgment is based constitute no part of the judgment itself even though incorporated in the same instrument. *The Judgment itself does not reside in its recitals but in the mandatory portions.* It has been expressly held that findings of the Commission embodied in its reports are not orders within the meaning of the statutes relating thereto." (Emphasis supplied).

We believe the analogy between a judgment and the Commission's orders is well stated. Certainly it is the decision—the mandatory portion of a judgment which is binding upon the parties and determines their respective rights—not the findings, as pointed out by this court.

So also, it is the order of the Commission, not the findings, which establishes or approves the rates for the future. The order in Docket 6806 having expired in 1917, the rates thereafter charged were no longer legislatively established or approved by the Commission. Nothing that the Commission had said or done in the case was any longer controlling as to the rates thereafter charged by the defendant carriers. This being true, the *Arizona Grocery Case* does not apply, and the Commission was free to grant reparations on shipments moving subsequent to the expiration date of the Order.

2. Changes made subsequently in the rates found not unreasonable in Docket 6806 destroyed any Commission-made (or approved) character which such rates theretofore might have possessed.

Defendants urge that although the rates charged plaintiffs on the shipments in question were higher than those

found not unreasonable in *Docket 6806,* the rates nevertheless remained commission-made (or approved) because the subsequent changes were authorized (Appellants' Brief, p. 35).

The rates found not unreasonable in Docket 6806 in 1915 to Bowie were 60c minimum weight 36,000 lbs. and 55c minimum weight 60,000 lbs., both from Los Angeles, California, and San Francisco, California. (R. 100). The rates charged plaintiff on shipments involved in these cases were 96½c, 96c and 86½c (all such shipments exceeding 60,000 lbs.) (R. 37-39). The rates prescribed by the Commission as reasonable on shipments for the reparation period were 75c, 83c, and 84c (R. 37-39). The rates charged were therefore considerably higher than the rates found not unreasonable in Docket 6806.

As above stated, defendants' attempt to explain this on the ground that the rates set forth in Docket 6806 were later changed or modified by authorized general changes (Appellants' Brief, p. 35).

The defendants will undoubtedly admit that at no time between the date of the decision in Docket 6806 and the dates of shipments here in question was the Commission called upon to consider the reasonableness of sugar rates to Bowie. But the defendants insist that these rates were changed either by the Director General of Railroads as head of the United States Railroad Administration, or in accordance with adjustments made in the general level of all rates, and they therefore remained commission-made.

This line of reasoning ignores entirely the law applicable, and the holding of many decisions hereinafter considered.

In the case of *Brimstone R. R. and Canal Co. v. U. S., 276 U. S. 104, at page 122,* 72 L. ed. 487, at 494, the Supreme Court said:

> "The general findings and permission of Ex Parte 74 and Matter of Reduced Rates did not approve of or fix any particular rate . . . Neither case approved 'any specific rate as reasonable in itself or as properly adjusted with respect to other rates nor did it justify in advance any rate which might be published as a result thereof'. In them the Commission was dealing with the whole body of rates throughout the country—were looking at the general level of all rates; and the propriety of the rates to which the Brimstone Company was party was not the subject of particular investigation or consideration."

The Supreme Court in that case cited with approval among other decisions of the Commission, S. and T. Co. v. *Director General, 61 I. C. C. 526,* in which the Commission said that its "sanction of a general adjustment does not carry with it the approval of any particular rate."

The order of the Director General in 1918 likewise was dealing with all rates, and had no particular reference to any rates on sugar; besides it was not the equivalent of an order of the Commission; and the Commission, by *Section 10* of the Federal Control Act (*40 Stat., 456*) was given the power to "suspend or set it aside."

This section authorized the Director General to initiate

rates, fares and charges, by filing the same with the Interstate Commerce Commission. It further provided that:

> " Said rates, fares, charges, classifications, regulations, and practices *shall be reasonable and just,* and shall take effect at such time and upon such notice as he (Dir. Gen.) may direct, *but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness* of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same." (Emphasis supplied.)

The action of the Director General in his Order No. 28 relied upon by defendants can not therefore be considered as equivalent to an order by the Commission. The defendants do not contend that the order of the Director General increasing the rates here in question was reviewed or considered by the Commission, or that it in any manner received the Commission's approval. This increase, by virtue of the Director's General's Order No. 28 was not commission-made, or even commission-approved. The Commission had nothing to do with it. All this was pointed out in the *Eagle Cotton Oil Company* decision.

This relationship between the Commission and the Director General was also considered in two cases cited by defendants in their brief (p. 36, 37).

Northern Pacific Ry. Co. v. North Dakota, 250 U. S. 135, 146; 63 L. ed. 897.

Mo. Pac. R. Co. v. Ault, 256 U. S. 554-563; 65 L. ed. 1087.

The court, in the last case cited said:

> "The government undertook, *as carrier,* to observe all existing laws."

In other words, the Director General's Order No. 28 was a carrier-made (not commission-made) increase.

That the Director General occupied practically the same position as the carriers in so far as rate making was concerned, is definitely settled in the case of

> *Director General v. Viscose Co.,* 254 U. S. 498; 65 L. ed. 372,

in which the court, at page 501, said:

> "The power to suspend classifications or regulations when issued by the President was taken away from the Interstate Commerce Commission by the 'Act to Provide for the Operation of Transportation Systems While Under Federal Control', etc., *but the power over them after hearing remained,* and the power to suspend was restored when "The Transportation Act, 1920", approved February 28, 1920, became effective. *The action of the Director General of Railroads, under consideration in this case, may, therefore, be treated as if it had been taken by a carrier* subject to the Act." (Emphasis supplied.)

While this case was dealing with an order of the Director General pertaining to classifications, the same power of the Commission to review changes in rates existed. See *Section* 10, *Federal Control Act,* (40 Stat., 456), quoted above.

Therefore any action of the Director General in Order No. 28 increasing the rates must "*be treated as if it had*

been taken by a carrier subject to the Act." That is, such increase was carrier-made in nature. This being true, the rate became carrier-made, and subject to subsequent reparation awards.

The defendants cite the decision of the District Court for Arizona in

> *El Paso & S. W. R. Co. v. Arizona Corporation Com.*, 51 Fed. (2), 573,

to sustain their contention on this point. What the court there held was that all intra-state rates in Arizona were by force of a state statute commission-made or approved, and that the carrier could not under this statute initiate any such rates; that such rates, being commission-made or approved, no reparation thereon could be allowed. No consideration was given to the effect of the Director General's Order No. 28.

Finally, the defendants insist that this court in the *Arizona Grocery Case* (49 Fed. (2), 563), reached the conclusion that the intervening general change of 1922 had not operated to deprive the rates of the commission-made status conferred upon them in 1921, and that the same reasoning applies in the present case. It must be remembered that the change in 1922 was a general reduction, not an increase, such as occurred twice in the present case, first under the order of the Director General, and second under Ex Parte 74. This court in considering the rates in the *Arizona Grocery Case,* and the effect of the reduction of 1922, said:

> "The ascertainment of a maximum rate is in effect

a decision that any rate below that maximum is reasonable as to the shipper. There was no change in the *subsequent action of the Commission or of the carriers which affected the maximum;* and no change in the maximum by the Commission because the voluntary act of the carrier in *reducing* its rate to 86.5 made an order unnecessary. The nature of this blanket order of the Commission was considered by the Supreme Court in *Brimstone R. R. and Canal Co. v. U. S.*, 276 U. S. 104." (Emphasis supplied.)

49 *Fed.* (2), 563, at page 571.

This statement does not lead to the conclusion that an increase of rates by an order of the Director General (Director General Order No. 28), or by a general order of the Commission (Ex Parte 74), makes such increased rates conclusively just and reasonable, and free from reparation.

3. SUMMARY OF PART I OF BRIEF

Concluding this first portion of our brief, we feel that it is hardly necessary to point out that the Commission has jurisdiction, as the administrative tribunal created by the Commerce Act, to find that rates which have been charged by railroads for the interstate transportation of property in the past have been unreasonable or otherwise unlawful, and to make awards of reparations to shippers for the exaction of charges on past shipments under such unlawful rates. This jurisdictional power is created by the Act.

Sec. 8; Sec. 9; Sec. 13 (1); Sec. 16 (1); 49 U. S. C. A.

And is amply and fully sustained by the decisions of the Supreme Court.

Texas & P. Ry. Co. v. Abilene C. O. Co., 204 U. S. 426; 51 L. ed. 553;
L. & N. R. Co. v. Sloss-Sheffield Iron Co., 269 U. S. 217; 70 L. ed. 242;
Mills v. Lehigh Valley R. R. Co., 283 U. S. 473; 59 L. ed. 1415;
Meeker v. Lehigh Valley R. R. Co., 236 U. S. 412; 59 L. ed. 645.

We have previously shown that the rates charged on the shipments involved in the instant cases were not rates which had been fixed or approved by the Commission as just and reasonable, because the effectiveness of *Docket 6806* had expired in 1917, and in addition subsequent changes had destroyed any commission-made (or approved) character which such rates possessed long before the shipments involved in these cases were made.

Thus the rates charged plaintiff during the period of reparation were carrier-made. It therefore follows that the Commission's award of reparation in favor of the plaintiff is valid and should be enforced.

Arizona Gro. Co. v. A. T. & S. F. Ry. Co., 284 U. S., 370, 390.

II.

THE TRIAL COURT IN THE INSTANT CASE FOUND THE RATES CHARGED PLAINTIFF WERE UNREASONABLE, AND THAT PLAINTIFF IS ENTITLED TO RECOVER REPARATIONS FROM THE DEFENDANTS. THIS DECISION OF THE TRIAL COURT SHOULD BE APPROVED.

1. The Commission's determination of the unreasonableness of the rates charged was conclusive on the Trial Court.

Defendants correctly anticipated (as set forth on page 66 of their brief) that plaintiff would urge that the Commission's determination in *Docket 16742* of the unreasonableness of the rates charged had to be taken as conclusive by the Trial Court, and also by this court.

Defendants in answer to this position of plaintiff cite many cases, but none deal as directly with the issue presented as do the three cases referred to in defendants' brief, the effectiveness of which the defendants attempt to destroy. We have in mind:

So. Carolina Asparagus Growers Assn. v. So. Ry. Co., 64 Fed. (2) 419;
Glenn Falls Portland Cem. Co. v. D. & H. Co., 66 Fed. (2) 490;

both decided in 1933 by two different Circuit Courts of Appeal (2nd and 4th), and the decision of the Supreme Court of the United States in,

Mitchell Coal and Coke Co. v. P. R. Co., 230 U. S. 247; 57 L. ed. 1472.

The decisions of both of the Circuit Courts of Appeal are based upon the remarks of Justice Lamar in the *Mitchell Case* (supra). In order fully to appreciate the significance and logic of these remarks it is necessary to read a substantial portion of the decision in the *Mitchell Case*, particularly appearing on pages 255-260 of the official report. We shall not attempt in the limited space of this brief to repeat the reasons for the rule set forth in that decision, except to point out the unassailable logic that any rule which does not make the decision of the Commission

on the question of reasonableness conclusive in reparation cases will destroy the principle of uniformity of rates required under the Act. This reasoning led to the principle set forth by Justice Lamar on pages 257 and 258, that where the suit is based upon unreasonable charges

> * * * "the whole scope of the statute shows that it was intended that the Commission and not the courts should pass upon that administrative question," * * * "such orders, so far as they are administrative, are conclusive, whether they relate to past or present rates, and can be given general and uniform operation, since all shippers who have been or may be affected by the rate can take advantage of the ruling and avail themselves of the reparation order. They are quasi-judicial and only prima facie correct in so far as they determine the fact and amount of damage,—as to which, since it involves the payment of money and taking of property, the carrier is by Section 16 of the Act given its day in court and the right to a judicial hearing."

Defendants cite the recent case of *Baltimore and O. R. Co. v. Brady,* 288 U. S. 448, as authority for a different rule, but an analysis of this decision discloses that it also recognizes the necessity of the rule of uniformity so forcibly pointed out by Justice Lamar in the *Mitchell Case.* On pages 456 and 457 the court said:

> "Questions as to the reasonableness of rules and regulations (also as to rates) * * * are for the Commission.
>
> "The facts stated in the complaint clearly show that there was *no question in this case requiring the exercise of the Commission's administrative power.*

> "The decision does not concern the reasonableness or validity of the rule itself and *it has no tendency against uniformity or other purpose of the Act.*" (Emphasis supplied.)

The question early arose as to whether a shipper in seeking reparation should first be compelled to secure a finding of the Commission that the rates charged were unreasonable. There are provisions in Section 9 of the Act which would indicate the shipper might go directly into court and there prove that the rates charged were unreasonable, without a previous finding of the Commission. The Supreme Court of the United States held however, in the case of *Texas & P. R. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, that notwithstanding these provisions of Section 9, and in order to secure unformity of rates and to avoid preference and discrimination, it was necessary for the Commission to find the rates in question unreasonable. In passing upon this question the court, on page 446, said:

> "In other words, the difference between the two is that which, on the one hand, would arise from *destroying the uniformity of rates which it was the object of the statute to secure,* and, on the other, from enforcing of that equality which the statute commands."

Under the contention of defendants different courts and different juries would reach different conclusions as to the reasonableness of a rate. Uniformity of rates would be destroyed and preference and discrimination would exist.

We submit that this court should adopt a rule which

will result in uniformity of rates; in other words, the rule set forth in the *Mitchell Case,* requiring the administrative order of the Commission on the question of reasonableness to be taken as conclusive. Any other rule would tend to destroy the principle of uniformity of rates.

The fact and amount of damage to plaintiff by reason of the assessment of the rates found unreasonable was not disputed by defendants. The proof on these questions was clear and convincing (R. 83-84; and 37-39). No attempt was made to contradict the facts set forth in this evidence.

The finding of unreasonableness being conclusive on the Trial Court, the fact and amount of damage being undisputed, the District Court properly rendered judgment for plaintiff.

2. **Whether a rate is reasonable or unreasonable is a question of fact. The report and findings in Traffic Bureau, et al v. A. T. & S. F. Ry. Co., 140 I. C. C. 171, and the awards of reparation made in favor of the plaintiff constituted a prima facie case before the Trial Court which the defendants failed to overcome. The decision of the Trial Court, being supported by substantial evidence, it is therefore conclusive on appeal peal as to this question of fact.**

There are ample and conclusive reasons why the judgment in this case should be affirmed, even if we accept the theory of defendants that all of the issues were before the District Court, including the question of unreasonableness of the rates charged.

Under this theory defendants assert that the trial in the District Court was de novo, and that the question of the reasonableness or unreasonableness of the rates involved

was before the court for determination. Defendants have, however, apparently lost sight of the fact that the question of whether a rate is reasonable or unreasonable is a question of fact, and not one of law.

Ill. Cent. R. R. Co. v. I. C. C., 206 U. S. 441; 51 L. ed. 1128;
T. P. R. Co. v. I. C. C. 162 U. S. 197; 40 L. ed. 940;
Cin., N. O. & T. R. Co. v. I. C. C., 162 U. S. 184; 40 L. ed. 935;
Jones v. Alton & S. R. Co., 6 Fed. Supp. 80)

and many other cases to the same effect.

The District Court found that the freight charges assessed the plaintiff on the shipments involved were unreasonable to the plaintiff, and in violation of the Interstate Commerce Act. (Finding of Fact, R. 215). The District Court also determined the reasonable rates which should have been charged (R. 215). The present cases as stated in defendants' brief were tried to the court without a jury, jury having been waived. (R. 51).

Therefore, even under the theory of defendants, the sole question before this court is whether there was substantial evidence to support this finding. If so, then such findings should not be disturbed.

The rule in such cases is that on appeal the judgment of the trial court in an action tried before the court without a jury, is conclusive if supported by substantial evidence, and such evidence must be considered in a light most favorable to appellee.

U. S. v. Linde, 71 Fed. (2), 925;
Victor Talking Machine Co. v. George, 69 Fed. (2), 871;

Mandel Brothers v. Henry A. O'Neill, Inc., 69 Fed. (2), 452;
Aberly v. Craven County, 70 Fed. (2), 52;
Bayless v. Gage, 69 Fed. (2), 269;
Kurecki v. Buck, 71 Fed. (2), 227.

And many other cases too numerous to cite.

Let us examine the amount and character of the evidence introduced and considered by the court.

Plaintiff introduced into evidence without objection on the part of the defendants the following:

(1) Copy of Opinion and Order of Interstate Commerce Commission in *Docket 16742* and associated cases. *Traffic Bureau v. A. T. & S. F. Ry. Co.*, 140 I. C. C. 171, (R. 83).

(2) Copy of order by Interstate Commerce Commission for payment of reparations to plaintiff in this case. (R. 84, 41 and 42).

(3) Copy of certain statements (Rule V, Statements), showing shipments made to and received by plaintiff upon which reparations allowed (R. 84, 37-39).

Thereafter plaintiff offered additional evidence through the witness L. G. Rief (beginning on page 85 of Record), who it was stipulated was qualified and competent to examine tariffs and compile exhibits therefrom showing rates, familiar with tariffs covering rates and charges from interstate points to Arizona, and qualified by experience to express an opinion with regard to such rates (R. 85). In addition is was admitted that this witness was and had

been for several years Rate Expert for the Arizona Corporation Commission.

This witness submitted a statement comparing rates prescribed for reparation purposes in the present case with Memphis-Southwestern sugar rates and 120% of Memphis-Southwestern sugar rates, together with other pertinent information in assisting the court to arrive at a conclusion of reasonableness of the rates in question. (R. 88-89). He testified that a rate of 80c from Northern California and 65c from Southern California points could be considered as reasonable for reparation purposes. (R. 91). On cross-examination he pointed out that the record in the *First Phoenix Case* was incomplete as to the question of reasonableness and that a decision of the Interstate Commerce Commission prescribing a reasonable rate between two points would not necessarily be used as the measure of a reasonable rate between two other related points in the same territory, although it would be entitled to some consideration (R. 91, 92). He further testified that Phoenix might have been entitled to a lower rate upon a more comprehensive record in the *First Phoenix Case.* (R. 94).

Mr. J. L. Fielding, a witness for defendants, stated under cross examination that Phoenix, Arizona, during the period of movement of the shipments here involved was not a point intermediate to Bowie, because Phoenix was on a branch line reached via Maricopa, whereas Bowie was on the main line; that Phoenix was considered by the carriers as a two-line haul, and that arbitraries were often added by the Commission and carriers for such two-line

hauls; that the conditions at Bowie differed from those at Phoenix, because Bowie was on the Southern Pacific main line (R. 82).

This witness further admitted that rates on sugar were blanketed all the way across to Trinidad, Colorado, and *mileage did not enter into consideration in the fixing of the rates.* (R. 182). Continuing, he stated that sugar going to Globe and Safford, Arizona, had to move through Bowie as a junction point (R. 183). He further admitted that the Commission was justified in ignoring mileage, volume of movement, and all other considerations in prescribing rates (R. 183).

Mr. Fielding was asked, assuming that the Commission had not rendered its decision in the *First Phoenix Case* would he say the rates to Bowie prescribed for reparation purposes were reasonable. His answer to this question, while evasive, did not amount to denial that such rates were not reasonable. The exact answer was:

> "I cannot answer that question, because it would be silly for me to say that those rates were reasonable for the past when they had not been approved for the past."
>
> (R. 183).

He then added that rates are always assumed to be reasonable until found otherwise. (R. 184).

He admitted that the comparison of rates shown on defendants' Exhibit "F" did not show reduction of rates actually charged to Phoenix. (R. 186).

On the other hand defendants introduced none of the

evidence introduced before the Interstate Commerce Commission in *Docket 16742,* and associated cases. Practically all of the evidence of defendants on the question of fact as to the reasonableness of the rates dealt with the history of rates to Bowie (R. 167 and 168), and with comparisons with rates to Phoenix, Globe and Safford (R. 170 and 171).

Regardless of defendants' assertions to the contrary, the findings in *Docket 16742* were "prima facie evidence of the facts therein stated." This is settled by the Commerce Act itself.

49 U. S. C. A., Sec. 16 (2).

These findings specifically stated that the Commission found that the rates to Bowie had been unreasonable to the extent thot they exceeded 75 and 84 cents from the Southern and Northern California groups respectively (R. 26); and they further found that complainants (including this plaintiff) had made shipments at rates found to have been unreasonable; that they paid and bore the charges thereon, and were damaged thereby to the amount of the difference between the charges paid and those which would have accrued at the rates found reasonable, and that they were entitled to reparation with interest. (R. 25-27). The reasons for these findings are also set forth at length in this report (R. 8-27 inc.). All this was before the court as *prima facie* evidence in support of plaintiffs' case; as was also the evidence of L. G. Reif and the evidence of witness Fielding above referred to.

Defendants have attempted to destroy the value of the findings in *Docket 16742* on the ground that the repara-

tion awards to shippers at Phoenix, Clarkdale, Globe and Safford, were held invalid in the *Arizona Grocery Case*, the *Wholesale Grocery Case*, and *T. F. Miller case* (District Court). Their argument is unsound. In the case of *Spiller v. A. T. & S. F. R. Co.*, 253 U. S. 117, 64 L. ed 810, the court was considering an award (including the findings thereon) which was partially invalid. On this point the court said:

> "If there be doubt whether it was sufficient to sustain each and every claim that was allowed, we are not now concerned with this; the ruling in question being the refusal of the trial court to treat the award as void in toto. This was not erroneous if, to any substantial extent, the award was legally valid. If a part only of the claims was unsupported by evidence, the request for an adverse ruling should have been directed to these." Page 132.

The findings in Docket 16742 dealt with many, in fact all, points in Arizona. While awards to Phoenix, Globe and Clarkdale, might have been invalid because of earlier decisions by the Commission, this should not be controlling on other points.

In a sense, under the contention of the defendant carriers, these cases very largely turn on whether or not the Interstate Commerce Commission, when it prescribed a rate to Phoenix in the First Phoenix Case, it did not also prescribe and fix all rates to all points in Arizona at the same time, although absolutely no mention is made of this fact in the First Phoenix Case; no evidence was introduced or any record made as to any rate except those to Phoenix; and no other rates to any other points in Ari-

zona were under attack. The syllabus in the First Phoenix Case reads:

> "Rates on sugar in carloads from *California points to Phoenix, Arizona,* found unreasonable. Reasonable rates prescribed for the future. R. 106.

In the *Arizona Grocery Case,* the Supreme Court pointed out that the great mass of rates will continue to be carrier-made rates, and upon which the Commission may award reparation. Under the contention now being advanced by the defendants, practically all rates throughout the United States would be commission-made, simply because rates at some particular points have been fixed and prescribed by the Commission.

The defendants insist that a comparison of rates to Phoenix was conclusive on the court. No attempt was made to show that the rates prescribed by the Commission to Bowie for the periods of reparation were confiscatory. No evidence as to costs of operation for these hauls was introduced. The defendants would suggest that the comparison of rates is the sole factor in determining the reasonableness of rates. This is incorrect, and the carriers are aware of it.

Just a brief quotation from a report of the Commission itself:

> "The problem is difficult, the facts to be considered multitudinous and of an infinite variety of modifying conditions, from which the Commission, without applying any policy which runs counter to the power granted and the duty imposed upon it, seeks

by "slow evolution" to develop a satisfactory system of rates."

Advances in Rates, Western Case, 201 I. C. C., 307, 379.

There are many other statements of the Commission in many other decisions to the same effect.

One court has expressed it as follows:

"A careful examination of the opinions of that court (as well as the evidence taken in these cases) shows that there are a great many factors and circumstances to be considered in fixing a rate. Noyes, Am. R. R. Rates, pp. 61, et seq., 85-109. Among other things: (1) The value of the service to the shipper, including the value of the goods and the profit he could make out of them by shipment. This is considered an ideal method, when not interfered with by competition or other factors. It includes the theory so strenuously contended for by petitioners, the Commission, and its attorneys, of making the finished product carry a higher rate than the raw material. This method is considered practical, and is based on an idea similar to taxation. I. C. C. v. B. & O. Ry. Co. (C. C. 43 Fed. 37, 53; Noyes, Am. R. R. Rates, 53). (2) The cost of service to the carrier would be an ideal theory, but it is not practical. Such cost can be reached approximately, but not accurately enough to make this factor controlling. It is worthy of consideration, however. I. C. C. v. B. & O. Ry. Co., 43 Fed. 37, 3 I. C. C. 192; Ransome v. Eastern Counties Ry. Co. (1857), I. C. B. N. S. 437, 26 L. J. C. P. 91; Judson on Interstate Commerce, pars. 148, 149; Western Union Tel. Co. v. Call Pub. Co., 181 U. S. 92, 21 Sup. Ct. 361, 45 L. ed. 765; I. C.

C. v. Detroit, Grand Haven & Milwaukee R. Co., 167 U. S. 633, 17 Sup. Ct. 986, 42 L. Ed. 306. (3) Weight, bulk and convenience of transportation. (4) The amount of the product or the commodity in the hands of a few persons to ship or compete for, recognizing the principle of selling cheaper at wholesale than at retail. I. C. C. v. B. & O. Ry. Co., 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699. (5) General public good, including good to the shipper the railroad company and the different localities. The I. C. C. v. B. & O. Ry. Co., 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699. (6) Competition, which the authorities as well as the experts, in their testimony in these cases, recognize as a very important factor. * * * None of the above factors alone are considered necessarily controlling by the authorities. Neither are they all controlling as a matter of law. It is a question of fact to be decided by the proper tribunal in each case as to what is controlling."

I. C. C. v. Chicago Gw. R. Co. 141 Fed. 1003-1015.

Aff: 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. 493.

This being true, it is absurd, it seems to us, for the defendants to point to one rate comparison as conclusive and controlling in the present cases and thus attempt to exclude all other factors. It must be recognized that the Commission in *Docket 16742* had many factors before it in making its decision, including the following: (1) the amount of haul, (2) a comparison with the Memphis-Southwestern and the Consolidated Southwestern rates, (3) the consumption of sugar in the territory involved, (4) the 4th Section of the Transportation Act, (5) the change in sugar shipping conditions, and finally (6) general transportation conditions from California to Arizona.

The report and findings of the Commission being before the court as *prima facie* evidence, these matters were therefore also before the court for consideration.

In addition the Commission has said that the mere fact that rates appear out of line with other rates to which they are closely related is not of itself sufficient to afford a basis for finding of reasonableness or unreasonableness.

City Coal Co. v. New York, 123 I. C. C. 609;
Dallas Paper Co. v. T. & N. R. Co., 132 I. C. C. 59;
Peabody Lbr. Co. v. Penn. R. Co., 132 I. C. C. 741.

The Commission has also said in considering the comparison of *per ton per mile* revenue of rates (as defendants attempted to do here, R. 202), such method of testing freight rates cannot be taken as a controlling rule in determining the reasonableness of rates.

2 I. C. C. 52
23 I. C. C. 519
40 I. C. C. 195
47 I. C. C. 44
81 I. C. C. 552.

In the case of *Railway Express Agency v. United States,* 6 Fed. Supp. 249, the court said it would not set aside Interstate Commerce Commission findings that certain rates were reasonable on the ground that such findings were inconsistent with findings made in other procedings before the Commission.

In a recent case the District Court for the Eastern District of Illinois, being confronted with a contention similar to that here advanced by defendants, said:

"* * * the question of reasonableness is always a question of fact, depending upon the proof in each case."

Jones v. Alton & S. R. Co., 6 Fed. Supp. 807, decided April 30, 1934.

This entire decision is very pertinent to the questions raised by the defendants in the instant case. Similar contentions were raised in that case. It disposed of all such contentions and affirmed an award of reparations in favor of the shipper.

All of Defendants' argument on this point is to the effect that the Commission having fixed the rates to Phoenix, Globe, and Clarkdale, and the Supreme Court and this Court having held that reparation could not be allowed to these points, that it follows that reparations could not be allowed to other points in the state, although the rates to such points had never been prescribed by the Commission. The defendants even work themselves up by the sophistry of their own argument to declare, on page 102 of their Brief, that the Commission by prescribing the reasonableness of the rates to Globe and Phoenix also thereby prescribed the reasonableness of all rates in Arizona on sugar, and therefore under the *Arizona Grocery Case* and the *Wholesale Grocery Case* reparation cannot be allowed to any other points in Arizona, notwithstanding the fact such other rates were carrier-made; and also notwithstanding the fact that such other points of destination had never had their day before the Commission on the question of the reasonableness of their rates. Such reasoning is absurd. The effect of sustaining such

argument would be equivalent to saying that whenever the Commission fixes a rate to one point the rates to all other points, at least in that particular state, are also conclusively fixed, although such other points had not been present or represented in such hearing. What a travesty on justice—that rights could be taken away in this fashion without an opportunity to be heard.

The defendants in the same vein argue to this court that while the findings of the Commission are merely *prima facie,* the rates to Globe, Clarkdale, and Phoenix, are conclusive, and therefore such rates must prevail over the *prima facie* character of the findings. This statement is wholly unfounded. The rates only to these places named were conclusive; but the rates to Bowie, the point here involved (and most of the other points in this state) had not been fixed conclusively, and the showing of the defendants had no such effect as to override the *prima facie* character of the findings.

The defendants' witness J. L. Fielding admitted that Defendants' Exhibit "F" did not show rates actually charged to Phoenix, but only the maximum rate prescribed in the *First Phoenix Case* in 1921.

It is therefore clear that when the rates actually charged to Phoenix are compared with rates prescribed by the Commission as reasonable to Bowie for the reparation period, the trial court was justified in its finding of unreasonableness of the rates charged plaintiff.

In addition the Interstate Commerce Commission itself found that the 96½c rate to Phoenix was based on an in-

sufficient and incomprehensive record (*Docket 16742,* R. 25). In fact it is well to review exactly what the Commission said in this regard:

> "For the first time the record before us is comprehensive in the evidence which it contains bearing upon the reasonableness of the rates assailed." (R. 25.)

This court and the Supreme Court has held that even though the Commission did prescribe the maximum rate of 96½c to Phoenix on such an incomplete record, it could not later ignore the rate so prescribed and allow reparation on a lesser rate to Phoenix. This holding, however, does not destroy the effect of the statement of the Commission in this regard when the reasonableness of rates to other points are being compared with a rate so improperly fixed.

Surely no one can logically or fairly argue that such a rate so made (i. e. on an incomprehensive and insufficient record) should have been taken by the trial court as conclusive in determining the reasonableness of rates to other points. The *First Phoenix Case* shows all that was done was to give Phoenix main line rates; that no attempt was made to pass on main line rates or on rates to other points in Arizona (R. 114).

The record in the *Second* and *Third Cases* shows clearly that the Commission recognized that an unreasonably high maximum rate was prescribed in the *First Phoenix Case.* This must be considered, regardless of the fact that such rate had to be taken as conclusively just and reasonable to Phoenix for the purpose of disallowing reparation to such point.

The maximum rate of 96½c to Phoenix having been prescribed by the Commission on an incomprehensive and insufficient record, resulted in an injustice to Phoenix shippers, who were thereby prohibited from recovering reparation. The rates to Bowie not being commission-made during the period of these shipments, there is no reason, either in law or in equity, why the rights of the plaintiff should be restricted or concluded by the injustice of the Phoenix situation. The wrongs to them should be corrected. The Commission having found the rates to Bowie unreasonable, the carriers cannot complain in being compelled to repay the overcharges, for they are only entitled to reasonable rates.

In this connection we would call the court's attention to the fact that the defendant carriers did not introduce in the trial of the present cases the evidence which was introduced before the Commission in *Docket 16742*. In the absence of this evidence the following rule is applicable:

> "The settled rule is that the findings of the Commission may not be assailed upon appeal in the absence of the evidence upon which they were made. Spiller v. Atchison, T. & S. F. R. Co. 253 U. S. 117, 125, 64 L. ed. 810, 817, 40 S. Ct. 466; Louisiana & P. B. R. Co. v. United States, 257 U. S. 114, 116, 66 L. ed. 156, 158, 42 S. Ct. 25; Nashville C. & St. L. R. Co. v. Tennessee, 262 U. S. 318, 324, 67 L. ed. 999, 1003, 43 S. Ct. 583; Edward Hines Yellow Pine Trustees v. United States, 263 U. S. 143, 148, 68 L. ed. 216, 220, 44 S. Ct. 72; Chicago, I. & L. R. Co. v. United States, 270 U. S. 287, 295, 70 L. ed. 590, 595, 46 S. Ct. 226.
>
> The appellant did not free itself of this restriction by submitting additional evidence in the form of affida-

vits by its officers. For all that we can know, the evidence received by the Commission overbore these affidavits or stripped them of significance. The findings in the report being thus accepted as true, there is left only the inquiry whether they give support to the conclusion. Quite manifestly they do."

Mississippi Valley Barge L. Co. v. United States, decided April 30, 1934; 290 U. S. .....; 78 L. ed. .....

See also *Jones v. Alton & S. R. Co., supra,* in which the court said:

"There being no presentation of the evidence submitted to the Commission in the present case, there is a *conclusive* presumption that the evidence supports the same."

The defendants cite as authority for this court reversing the finding of the lower court on the question of fact as to unreasonableness, the case of *Southern Ry. Co. v. Eichler,* 56 Fed. (2) 1010.

When we remember that the question of reasonableness is a question of fact, not law (this has previously been shown by ample and undisputed authority), we find that this case is no authority for the position of defendants. In the case cited the Appellate Court was reviewing a question of law, which is always open to review. This is clearly shown by the following excerpt from the opinion in that case:

"In this view, the question at issue resolved itself in *one of law,* requiring the construction of a tariff."

"What construction shall be given to a railroad tariff presents ordinarily a question of law."

After all, the situation here presented is simply that considerable evidence was introduced before the lower court, some documentary, some by oral and documentary testimony of expert witnesses, substantiating the plaintiffs' case. Upon this evidence the court made its findings, which should not be here disturbed. See authorities *supra,* also the following:

> "The only question with which this court can be concerned upon review is whether there was any substantial evidence to support the findings of the trial court."
>
> *Kurecki v. Buck,* 71 Fed. (2), 227, 229.

This court recently decided the case of *U. S. v. Alger,* 68 Fed. (2), 592, 593. In this case the court said:

> "The record discloses some conflict in the opinions of the expert witnesses, but such disagreement, together with the weight to be given the opinion and evidence, were all for the consideration of the jury."

It has been otherwise stated:

> "It is not within our province to usurp the authority of that court by substituting our judgment for its judgment in the ascertainment of facts when the evidence supports such findings."
>
> *So. Ry. Co. v. Blue Ridge Power Co.,* 30 Fed. (2), 33, 40.

This court has also said:

> "We do not weigh the evidence; what our verdict would have been as jurymen is immaterial."
>
> *United States v. Dudley,* 64 Fed. (2), 743, (9th C. C. A. decided April 1933).

The same holds true where the matter has been tried to the court.

Appellate courts will not disturb findings of fact where the evidence is conflicting.

> *Mitchel Coal & Coke Co. v. P. R. Co.*, 230 U. S. 247, at 256.

Applying these rules, it is clear that the findings of fact of the District Court on the question of the unreasonableness of the rates charged plaintiffs should not be disturbed.

3. The question of discrimination is not properly before this court, and in any event is not an issue that can be raised by defendants.

Defendants in this court raise the issue that to sustain the awards of reparations granted plaintiff would result in unlawful discrimination. (Beginning on page 80, Appellants' Brief.) This issue was not presented to the Trial Court. No mention of discrimination is made in either plaintiffs' complaint (R. 2 and 7) or in defendants' answers. (R. 46-50). What constitutes discrimination is a question of fact.

> *I. C. C. v. So. Pac. Co., et al*, 123 Fed. 597, 601.
> *Tex. & Pac. Ry. Co. v. I. C. C.*, 162 U. S. 197, 220; 40 L. ed. 940, 946;
> *I. C. C. v. Ala. Midland Ry. Co.*, 108 U. S. 144, 170; 42 L. ed. 414.

Therefore, to have raised this question it should have been pleaded. Defendants did not ask for a finding of fact by the trial court upon the question of discrimination (R. 198-207).

No mention is made of the question of discrimination in defendants' Assignments of Error. (Def. Brief 9-13). This question cannot therefore be raised in this court for the first time, and it is therefore not open for consideration in this appeal.

Louie Share Gan v. White, 258 Fed. 798 (C. C. A. 9th);
Wight, et al. v. Washoe County, 251 Fed. 819 (C. C. A. 9th);
Behn, Meyer Co. v. Campbell, et al., 205 U. S. 403; 51 L. ed. 857.

There is another reason why this issue of discrimination cannot be considered in these cases. The Supreme Court has stated that the question of prejudice and discrimination is not one that can be raised by the defendant carriers. In the case of *Interstate Commerce Commission v. Chicago, R. I. and P. Ry. Co. et al.,* 218 U. S. 88, the carriers were attacking an order of the Commission on the basis that it was discriminatory; just as the defendants are here attacking the present orders. To this the court answered, at page 108:

> "That the companies (railroads) may complain of the reduction made by the Commission so far as it affects their revenues is one thing. *To complain of it as it may affect shippers or trade centers is another. We have said several times that we will not listen to a party who complains of a grievance which is not his.* Clark v. K. C., 176 U. S. 114, 118; 44 L. ed. 392, 396; Smiley v. Kansas, 196 U. S. 447; 49 L. ed. 546." (Emphasis supplied.)

It must be remembered that other shippers and localities in Arizona are not complaining about discrimination or prejudice. There is no objection on their part to the defendants complying with the orders of the Commission and paying these plaintiffs. Until the question of discrimination and prejudice is raised by these shippers and the localities themselves, it is no concern of the defendants.

At no place in the brief of the defendants is any contention made that the rates in question are confiscatory. No attempt is made to show that the rates allowed by the Commission would result in confiscation of the property of the defendant. Without this we believe that the entire force of their argument falls.

In addition to the foregoing conclusive reasons why the issue of discrimination should not be considered here, the following facts show this contention is improper: At the same time these cases now on appeal were being tried in the District Court, there were several others also being heard involving reparation orders on shipments of sugar to Prescott, Kingman, Williams, Flagstaff, Holbrook, and Yuma, Arizona. All of these reparation orders arose out of, and were based on, the findings in *Docket 16742*. Judgments were entered by the District Court in each of these cases in favor of the plaintiffs, i. e. sustaining the awards, just as judgments were entered in the present cases. The evidence introduced was essentially the same in all of the present cases then being tried, except as to the particular shipments to the various points and the specific awards of reparation thereon. Notwithstanding all that has been argued by the defendants in the present cases on appeal, the

carriers satisfied these judgments, i. e. paid the reparations to the points above mentioned.

Appendix "A" appearing at the conclusion of this brief shows, (1) the approximate location of the points at which the carriers have already paid the reparations, (2) the rates found reasonable to these points for reparation purposes, and (3) the point here concerned, together with rates found reasonable for reparation purposes. The seven points at which the awards have been paid are underlined in red, the point here involved is underlined in green.

As the carriers have already paid the reparation awarded to complainants at these several points, it irresistibly follows that their argument that unjust discrimination and undue prejudice would result if the awards here on review were ordered paid, is obviously untenable. Just the reverse is true.

4. No error occurred in the introduction of evidence before the Trial Court.

Defendants base their objection to the introduction of the testimony of witness Rief and plaintiff's Exhibit No. 4 on three grounds: (1) the exhibit was not prepared by witness Rief; (2) the exhibit contained certain additions and omissions as to the destinations, rates and distances involved; and (3) the testimony of Rief shows that some other rates should have been prescribed for reparation purposes than those found reasonable by the Commission. We shall deal with them in this order.

(1) As to the exhibit not being prepared by the witness, the record discloses that he checked the exhibit to see

that it was correct, and helped to a certain extent in its preparation (R. 85). We believe this ample and sufficient to justify its acceptance by the court. Clearly the test in such cases is that the witness testify that the exhibit is correct. Mere preparation by the witness would not signify that it was correct. Here Rief testified that he had checked the exhibit before its introduction and found it correct, and in addition had helped in its preparation.

(2) As to the second ground, that the exhibit contained certain additions and omissions, this would be unsound, even if true. Such complaint would go to its evidentary value, not its competency. In other words, the court could consider these facts in valuing its weight. However, it is incorrect to say there were any improper additions or omissions in the exhibit. The witness Rief testified what the exhibit purported to show (R. 85), and in that regard it was complete (R. 87-88). If the defendants felt there were other matters to be considered not shown in the exhibit, they were at liberty to call them to the court's attention. A similar situation existed as to defendants' Exhibit "F", (R. 170). On cross examination defendants' witness Fielding admitted that it did not contain certain facts pertaining to the rates on sugar to Phoenix (R. 186). However, the court correctly admitted the exhibit for what it purported to be, and for what it was worth. Again, as shown later in this brief, the matter being tried to the court without a jury, the court possessed wide discretion in passing upon the question of competency of the evidence.

(3) As to the third ground, that the testimony of witness Rief shows that some rates should have been pre-

scribed for reparations purposes other than those found reasonable, we refer the court to the actual testimony of this witness in this regard (R. 89-94). He pointed out the unsoundness of accepting as conclusive the rate of 96½c prescribed in the *First Phoenix Case* in determining the reasonableness of the rate to Bowie for the reason that the record in that case was incomplete. Nothing in the *Arizona Grocery Case* said the statement of the Commission in this regard was untrue. It only held that even though this was true, reparation could not be awarded to Phoenix. The defendants derive a great deal of comfort from the statement of the Commission that a "full investigation" had been had, although the carriers well know this is a statement used more or less formally in many reports of the Commission, and that as a matter of law the Commission is bound by the record before it in each case, and every finding of the Commission must be based upon and confined to the evidence introduced.

> "But a finding without evidence is beyond the power of the Commission."
>
> *U. S. v. Abilene & S. R. Co.*, 265 U. S. 274, 288.

See also

> *B. & O. R. Co. v. U. S.*, 264 U. S. 258.

This principle was set forth in the case of *I. C. C. v. L. & N. R. Co., 227 U. S. 88,* at page 93, as follows:

> "The Commissioners cannot act upon their own information, as could jurors in primitive days."

Certainly, if the record in the *First Phoenix Case* was incomplete (and the Commission itself said it was), then

a finding based upon such a record might be incorrect. Such was the testimony of the witness Rief, and the court was entitled to consider such evidence.

As to the basis submitted by Mr. Rief for determining the reasonableness of the rates in question, he stated that the carriers themselves insisted that water competition existed and therefore the rate of 90c was too high, and that the rate of 84c fixed by the Commission might well have been lower in view of such water competition (R. 91).

All of defendants' objection to such testimony appearing on page 92 of their brief goes to the weight of Mr. Rief's testimony, not to its competency or admissibility. The matter of its weight was for the court. *Cyc. on Fed. Procedure, vol. 2, p. 709.*

Finally, this point should have little or no weight. The cases having been tried to court without a jury, strict rules of evidence do not apply. The erroneous admission of evidence in cases tried by a court sitting without a jury is not grounds for reversal. *Chicago B. & L. Co. v. City of Pittsburgh,* 271 Fed. 678. In an opinion recently written by Judge Sawtelle, this court held that the presumption on appeal is that any testimony erroneously admitted by a chancellor was disregarded.

National Res. Ins. Co. v. Scudder, 71 Fed. (2), 884.

The general rule is that judgment rendered after trial by a court without a jury will not be reversed for admission of incompetent evidence, where there is sufficient competent evidence to sustain the finding.

South Fork Brewing Co. v. United States, 1 Fed. (2),

167, cert. den. 266 U. S. 626, 69 L. ed. 475;
Cascaden v. Bell, 257 Fed. 926;
Lackner v. McKechney, 2 Fed. (2), 516, cert. den. 267 U. S. 601; 69 L. Ed. 808;
Hall v. United States, 267 Fed. 795;
Gardner v. United States, 71 Fed. (2), 63 (9th C. C. of A.).

There can be no doubt that the findings and report in *Docket 16742* are sufficient evidence alone upon which to sustain the findings and decisions of the District Court.

III.

THE TRIAL COURT CORRECTLY ASSESSED ATTORNEY'S FEES.

On page 99 of Defendants' brief they call the court's attention to an alleged error, relating to the amount of the attorneys fees awarded as part of plaintiffs' costs in the trial court.

Their point is that the complaint asked for $500.00 and prayed for the award of that amount (R. 7); that subsequently the court found that 20% of the total amount due from defendants would be reasonable (R. 197), and that in accordance therewith judgment was entered for $597.44 attorneys fees, or $97.44 in excess of the amount set forth in plaintiffs' complaint.

In the first place this point is not subject to review because no mention is made in the Assignments of Error on this point, and no objection was entered or any exception taken to the allowance of attorneys fees on this ground, i. e. for this overage of $97.44. Other reasons

attacking the allowance of the fees were asserted, but not this one (R. 197, 255). It is therefore not properly here for review.

Cyc. Fed. Procedure, vol. 6, pp. 41, 42, 49.
Louie Share Gan. v. White, 258 Fed. 798 (C. C. A. 9th).
Wight, et al v. Washoe County, 251 F. 819 (C. C. A. 9th).

In addition, even if it were here for review, the position taken by defendants is unsound. *Section 16 of the Commerce Act* says that if the complainant shall prevail in his suit to enforce the reparation award he shall be allowed a *reasonable attorneys fees, to be taxed and collected as part of the costs of the suit.* In the case of *Mellon v. World Pub. Co.,* 20 Fed. (2) 613, *(8th Circuit Court of Appeals),* the court was considering the effect of this section and, on page 618, said:

> "Nor is it (attorneys fees) a part of the damage to the shipper, and thus an element in the cause of action itself. It is made a part of the costs and recoverable only as such. *Not being a part of the cause of action, it need not be pleaded. It is not a subject on which issue can be joined.* Its allowance is dependent on a determination of the issues in plaintiff's favor. If the plaintiff prevail it shall be allowed to him and taxed as other costs are taxed. Not until plaintiff prevails does it become a subject of controversy."
> (emphasis supplied)

We believe this disposes of any argument on this point. It was solely a matter for the court to fix and, as said above *"it need not be pleaded"*. Therefore the allegation as to attorneys fees in plaintiff's complaint was mere surplus-

age. A similar situation would arise if plaintiff had asked in its complaint for a certain amount to be taxed as costs. The court, notwithstanding such allegation, would have fixed the actual and allowable costs.

The cases cited by defendants on this point are not applicable. They do not deal with the question of attorneys fees allowable under the Interstate Commerce Act as part of the costs.

CONCLUSION.

As stated in the foreword to our argument, there are only two principal questions presented to this court by the defendants in their Assignments of Error and Argument. These two questions are:

1. Were the awards of reparation in favor of plaintiff jurisdictionally made by the Interstate Commerce Commission; and

2. Is the finding of unreasonableness made by the District Court as to the rates charged plaintiff, supported by substantial evidence?

If the court decides these two questions in the affirmative, then the judgment of the Trial Court should be affirmed, and all of the errors asserted by defendants in their brief (pp. 9-13) will be disposed of, with the possible exception of No. 7, pertaining to the reasonableness of attorneys' fees allowed plaintiff by the Trial Court.

The matter of "overage" in attorneys fees allowed by the court is considered in Part III of this brief. The defendants did not present any argument on the question of

the reasonableness of the amount allowed by the court other than on this "overage". We take it, therefore, under holdings of this court that this assignment will not be considered. In addition there was ample testimony to support the finding of the Trial Court on this point. (R. 188-192). The allowance of attorneys fees is provided for by the Interstate Commerce Act, Sec. 16 (2), 49 U. S. C. A. 16 (2).

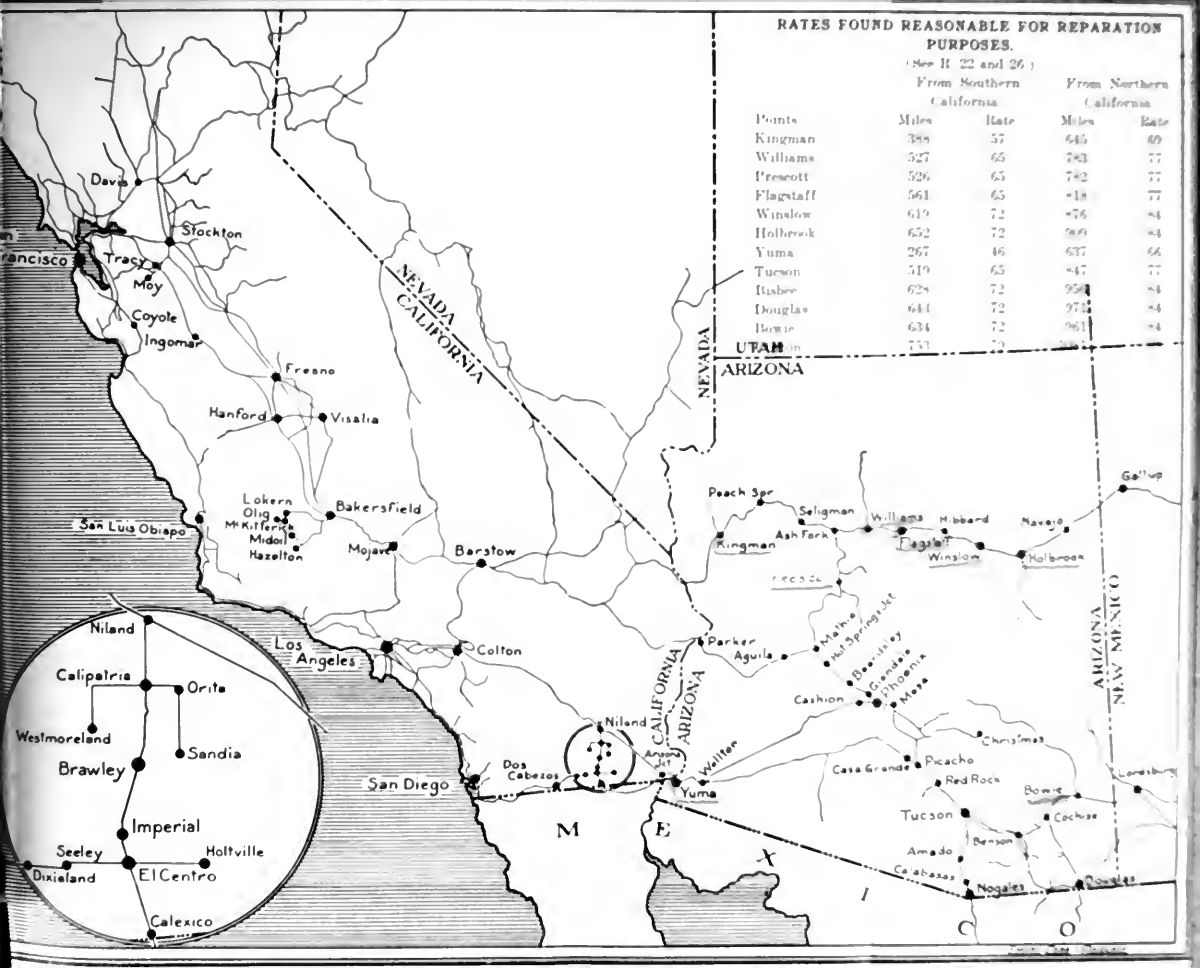
We believe the authorities cited, together with the reasons set forth in this brief, sustain in every detail the judgment of the Trial Court. We ask this court, therefore, to affirm the decision of the District Court.

Respectfully submitted,

FRED J. ELLIOTT,
FRANK L. SNELL, JR.,
Attorneys for Plaintiff and Appellee.

Dated, Phoenix, Arizona,
October 29, 1934.

Appendix


RATES FOUND REASONABLE FOR REPARATION PURPOSES.
(See R. 22 and 26.)
From Southern California
From Northern California
Points
Miles
Rate
Miles
Rate
Kingman 388 57 645 69
Williams 527 65 783 77
Prescott 526 65 782 77
Flagstaff 561 65 818 77
Winslow 619 72 876 84
Holbrook 652 72 909 84
Yuma 267 46 637 66
Tucson 519 65 787 77
Bisbee 628 72 956 84
Douglas 644 72 972 84
Bowie 634 72 961 84
NEVADA
CALIFORNIA
UTAH
ARIZONA
NEVADA
ARIZONA
NEW MEXICO
Davis
Stockton
Tracy
Moy
Coyole
Ingomar
Fresno
Hanford
Visalia
Lokern
Olig
Mc Kittrick
Midoil
Hazelton
Bakersfield
Mojave
Barstow
San Luis Obispo
Los Angeles
Colton
San Diego
Niland
Calipatria
Orita
Westmoreland
Sandia
Brawley
Imperial
Seeley
Holtville
Dixieland
El Centro
Calexico
Peach Spr
Seligman
Williams
Hibbard
Navajo
Gallup
Kingman
Ash Fork
Flagstaff
Winslow
Holbrook
Parker
Aguila
Matlock
Hot Springs Jct
Beardsley
Glendale
Phoenix
Mesa
Cashion
Niland
Ansel Jct
Dos Cabezos
Yuma
Wellton
Casa Grande
Picacho
Red Rock
Christmas
Tucson
Bowie
Cochise
Benson
Amado
Calabasas
Nogales
Douglas
MEXICO

No. 7343

United States

Circuit Court of Appeals

For the Ninth Circuit.

SOUTHERN PACIFIC COMPANY, a Corporation,
Appellant,

vs.

F. J. BAFFERT and A. S. LEON, Copartners, trading under the firm name of BAFFERT & LEON,
Appellees.

and

SOUTHERN PACIFIC COMPANY, a Corporation, and SANTA MARIA VALLEY RAILROAD COMPANY, a Corporation,
Appellants,

vs.

WHEELER-PERRY COMPANY, a Corporation,
Appellee.

Transcript of Record

Upon Appeals from the District Court of the United States for the District of Arizona.

Filed

FEB 16 1934

PAUL P. O'BRIEN,
CLERK

Parker Printing Company, 545 Sansome Street, San Francisco.

No. 7343

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Circuit Court of Appeals

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*Page numbering appearing at the foot of page of original certified Transcript of Record

In the District Court of the United States, in and for the District of Arizona.

No. L-738-Phx.

F. J. BAFFERT and A. S. LEON, co-Partners trading under the firm name of Baffert & Leon,
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,
Defendant.

COMPLAINT AT LAW.

Come now the above named plaintiff's and for cause of action against the above named defendant, complain and allege:

I.

That at all times hereinafter mentioned plaintiffs, F. J. Baffert and A. S. Leon, were and now are co-partners doing business in the State of Arizona under the firm name of Baffert & Leon;

II.

That at all times hereinafter mentioned the Southern Pacific Company was and now is a railway corporation engaged in the operation of railroads and railway lines for the transportation of freight in interstate commerce;

III.

That prior to the filing of this complaint these plaintiffs filed their petition and complaint with and

before the Interstate Commerce Commission of the United States, alleging that the freight rates charged and collected upon 18 car load shipments of sugar, originating at Crockett and Oxnard, State of California, and destined to the complainants at Tucson, Arizona, were unjust, [5] unreasonable and excessive as to the said complainants, and asking for reparation upon said shipments for the amounts that the rates charged by the defendant upon said shipments exceeded the rates which the Commission might determine should have been charged upon said shipments; that thereafter the defendant filed its answer to said complaint with and before the Interstate Commerce Commission; said cause being docketed under Docket No. 17549 (Sub-No. 1).

IV.

That said Interstate Commerce Commission made, issued, published and filed its Report and Findings of Fact on March 12, 1928, in which said Commission found that the rates of 84¢ and 75¢ per hundred pounds which had been charged by said defendant against said plaintiffs upon said 18 car load shipments of sugar from said points of origin in California to Tucson, Arizona, were unjust, unreasonable and excessive, as to the plaintiffs to the extent that they exceeded a rate and charge of 77¢ per hundred pounds upon all shipments originating at Crockett, California, and a rate of 73¢ per hundred pounds upon all shipments originating at Oxnard, California from and after July 1, 1922; and said Commission in said Report and Findings further

found that the plaintiffs herein were entitled to reparation on all said shipments from said points of origin in California to said point of destination in Arizona, and to interest thereon, a copy of which Report and Findings of said Commission is hereto attached, marked Exhibit "A", and made a part hereof;

V.

That said Commission required and directed that said complainants should comply with Rule V, of the rules and practice of the Interstate Commerce Commission which rule required a statement of shipments, the dates thereof, the dates on which charges therefor [6] were paid, the car initials and numbers, points of origin, the routes over which the shipments moved, the weights of shipments, the rates charged, the amounts collected, the rates which should have been charged, the amounts which should have been collected and the differences between the charges assessed and those which the Commission found should have been collected; that in pursuance of said requirements of the Interstate Commerce Commission the complainants, plaintiffs herein, did duly and properly certify a statement under said rule and transmitted the same to the defendant, Southern Pacific Company, and the same was thereafter certified to by said Southern Pacific Company and was transmitted by the Southern Pacific Company to the Interstate Commerce Commission as required by the rules and regulations of said Commission, a copy

of which statement is hereto attached, marked Exhibit "B", and made a part hereof.

VI.

That thereafter, and on the 7th day of September, 1929, said Commission duly made and published its order directing and requiring the defendant herein to pay unto the said plaintiffs, *T.* J. Baffert and A. S. Leon, co-partners trading under the firm name of Baffert & Leon, the sum of $726.28, together with interest thereon at the rate of six per cent per annum from the respective dates of payment of the charges shown on Exhibit "B", the said sums to be paid on or before the 22nd day of October, 1929; said reparation being on account of the unreasonable rates charged for the transportation of said car load shipments of sugar from Crockett and Oenard, California, to Tucson, Arizona, as will more fully appear from a copy of said order hereto attached, marked Exhibit "C", and made a part hereof; [7]

VII.

That said defendant has failed and refused to pay said reparation or any part thereof either principal or interest, although request and demand has heretofore been made by the plaintiffs upon the defendant for the payment of said reparation;

VIII.

That by reason of said unjust, unreasonable and excessive rates and charges and payment thereof by the plaintiff, and by reason of the refusal of said

defendant to pay said reparation awarded by said Commission, the plaintiff have been damaged in the sum of $726.28, together with interest thereon at the rate of six per cent per annum from the respective dates of the payment of the charges as shown on Exhibit "B", no part of which has ever been paid;

IX.

That the sum of $300.00 is a reasonable attorney's fee to be allowed in this action;

WHEREFORE, plaintiffs demand judgment in their favor and against the defendant for the sum of $726.28, together with interest thereon from the respective dates of payment as above set forth, together with $300.00 as and for attorney's fee and for plaintiffs' costs and disbursements in this action, and plaintiffs pray that process may issue hereon.

SAMUEL WHITE,
V. R. SEED,
Attorneys for Plaintiff. [8]

EXHIBIT A

13146

Interstate Commerce Commission

No. 16742[1]

TRAFFIC BUREAU OF PHOENIX CHAMBER OF COMMERCE ET AL. v. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

Submitted April 6, 1927. Decided March 12, 1928

Rates on sugar, in carloads, from California points to destinations in Arizona and from California and Colorado points to Gallup, N. Mex., found unreasonable. Reasonable rates prescribed and reparation awarded. Original findings in Nos. 14449 and 14140 modified in part. Former reports, 95 I. C. C. 244 and 101 I. C. C. 667.

Roland Johnston, Chas. E. Blaine, Calvin L. Blaine, F. W. Pullen, and R. S. Sawyer for complainants.

James R. Bell, G. H. Muckley, James E. Lyons, H. H. McElroy, A. Burton Mason, J. L. Fielding, Del W. Harrington, E. W. Camp, Platt Kent, F. W. Mielke, and Berne Levy for defendants.

Report of the Commission

CAMPBELL, Chairman:

These cases are related and will be disposed of in one report. Defendants in all of the cases and complainants in Nos. 16742, 16770, and Sub-Nos. 1, 3, 4, 5, and 9 filed exceptions to the proposed report of

the examiners, and defendants replied to complainants' exceptions. The cases were orally argued before us.

In these complaints it is alleged that the rates on sugar, in carloads, from California points to destinations in Arizona and from [9] California, Kansas, and Colorado points to Gallup, N. Mex., were and are unreasonable and in some instances unduly

---

[1]This report also comprises No. 16770, Bashford-Burmister Company v. Atchison, Topeka & Santa Fe Railway Company et al.; No. 16770 (Sub-No. 1), Central Commercial Company v. Same; No. 16770 (Sub-No. 2), Wheeler Perry Company v. Santa Maria Valley Railroad Company et al.; No. 16770 (Sub-No. 3), T. F. Miller Company v. Atchison, Topeka & Santa Fe Railway Company et al.; No. 16770 (Sub-No. 4), E. F. Sanguinetti v. Southern Pacific Company et al.; No. 16770 (Sub-No. 5), Arizona Grocery Company v. Atchison, Topeka & Santa Fe Railway Company et al.; No. 16770 (Sub-No. 6), Arizona Wholesale Grocery Company et al. v. Arizona Eastern Railroad Company et al.; No. 16770 (Sub-No. 7), C. N. Cotton Company v. Atchison, Topeka & Santa Fe Railway Company et al.; No. 16770 (Sub-No. 8), Babbitt Brothers Trading Company et al. v. Same; No. 16770 (Sub-No. 9), Wm. H. Dagg Mercantile Company v. Same; No. 17549, Phelps Dodge Mercantile Company v. Same; No. 17549 (Sub-No. 1), Baffert & Leon v. Same; No. 17466, United Verde Extension Mining Company v. Same; No. 17781, Simpson-Ashby Company v. Southern Pacific Company; and Nos. 14140, Solomon-Wickersham Company v. Santa Maria Valley Railroad Company et al., and 14449, Traffic Bureau, Phoenix Chamber of Commerce et al. v. Atchison, Topeka & Santa Fe Railway Company et al., reopened for argument.

prejudicial and preferential. We are asked to prescribe just and reasonable rates for the future and to award reparation. Rates and rate differences are stated in amounts per 100 pounds.

In No. 16742, filed February 9, 1925, and No. 17781, filed informally March 16, 1925, and formally November 27, 1925, reparation is asked, respectively, on shipments from California points to Phoenix to the basis of the rate of 71 cents found reasonable on and after July 1, 1922, in No. 14449, Phoenix Chamber of Commerce v. A., T. & S. F. Ry. Co., 95 I. C. C. 244, reopened for argument with these consolidated cases.

In No. 16770 (Sub-Nos. 1 to 9), filed on various dates from February 17 to May 5, 1925, inclusive, it is alleged that the rates from California points to Prescott, Kingman, Tucson, Clarkdale, Yuma, Bowie, Safford, Globe, Flagstaff, Winslow, and Holbrook, Ariz., and from California, Kansas and Colorado points to Gallup were and are unreasonable. There are also allegations that the rates assailed were and are unduly prejudicial to Tucson and unduly preferential of Phoenix; unduly prejudicial to Bowie, Safford, and Globe and unduly preferential of Phoenix and other points taking the same rate, Lordsburg and Deming, N. Mex., and El Paso, Tex.; unduly prejudicial to Gallup and unduly preferential of Albuquerque, N. Mex., and El Paso; and unduly prejudicial to Kingman, Flagstaff, Winslow, and Holbrook and unduly preferential of Albuquerque and Phoenix.

In Nos. 17549, 17549 (Sub-No. 1), and 17466, filed, respectively, on September 3, 1925, February 9, 1926, and August 24, 1925, the rates from California points to Bisbee, Douglas, Clifton, Tucson, and Clarkdale, Ariz., are alleged to have been and to be unreasonable and also unduly preferential of Phoenix and other points.

No. 16742 and No. 16770 (Sub-Nos. 1 to 9) were heard together. Nos. 17549, 17549 (Sub-No. 1), and 17466 were heard together. The parties in No. 17781 agreed to submission of the case upon the record in Nos. 17549, 17549 (Sub-No. 1), and 17466, except as to proof of payment of freight charges.

Phoenix is the only point in Arizona served by both the Atchison, Topeka & Santa Fe, hereinafter referred to as the Santa Fe, and the Southern Pacific. It is at the terminus of a branch line of the Santa Fe extending south from Ash Fork, Ariz., 194 miles, but California traffic over the Santa Fe is handled over a branch line, known as the Parker cut-off, extending from Cadiz, Calif., to Wickenburg, Ariz., a point on the Ashford-Phoenix branch, approximately 54 miles north of Phoenix. At the time of the hearings traffic from California [10] moving over the Southern Pacific reached Phoenix over the former Arizona Eastern Railroad, which connects with the main line of the Southern Pacific at Maricopa, Ariz., 35 miles south of Phoenix. Since the hearings the Southern Pacific has opened its new line from Wellton, Ariz., to Phoenix. The distances over this new line are 25 miles shorter than via Maricopa. From Los Angeles and San

Francisco the present distances to Phoenix are, respectively, 489 and 800 miles over the Santa Fe and 426 and 896 miles over the Southern Pacific.

Kingman, Williams, Flagstaff, Winslow, Holbrook, and Gallup are on the main line of the Santa Fe. Clarkdale is at the terminus of a branch line of the Santa Fe, 38 miles in length which extends from Drake, Ariz., a point 21 miles south of Ash Fork on the Maricopa-Phoenix line.

Yuma, Tucson, and Bowie are on the main line of the Southern Pacific. Safford and Globe are on a branch line of that carrier extending from Bowie. Clifton is on a branch line of the same carrier extending from Lordsburg. Bisbee and Douglas are served by the so-called southern lines of the Southern Pacific, formerly the El Paso & Southwestern.

The California points of production extend from San Francisco on the north to Los Angeles on the south. They include San Francisco and Crockett, the only two points at which Hawaiian cane sugar is refined, as well as all points at which beet sugar is produced. All California refining points take the same rates to Arizona destinations.

In Maier & Co. v. Southern Pacific Co., 29 I. C. C. 103, decided January 6, 1914, a rate on sugar from Los Angeles and Los Alamitos, Calif., to Benson, Ariz., of 60 cents, minimum 36,000 pounds, was prescribed. This was the contemporaneous rate to El Paso, a point more distant than Benson on the same line. The 60-cent rate was established generally to main-line Southern Pacific and Santa Fe

points in Arizona and New Mexico, and the San Francisco rate was made 10 cents higher.

In Fourth Section Violations in Rates on Sugar, 31 I. C. C. 511, we denied authority to continue rates on sugar from San Francisco and other sugar-producing points in California to Trinidad, Colo., and other points east thereof, which were lower than the rates concurrently applicable on like traffic to intermediate points on the line of the Santa Fe, and also denied authority to the Southern Pacific, El Paso & Southwestern, and Chicago, Rock Island & Pacific to continue lower rates on sugar from the points of production described to the Missouri River than the rates concurrently applicable to intermediate points west of Tucumcari, N. Mex. In addition [11] to making substantial reductions in the rates in connection with the minimum of 36,000 pounds, the carriers on November 15, 1914, established rates, with a minimum of 60,000 pounds, from all California producing points to practically all Arizona points on a basis 5 cents lower than the rates from Los Angeles to the same destinations upon the lower minimum.

In Arizona Corporation Commission v. A., T. & S. F. Ry. Co., 34 I. C. C. 158, the rates from California to Phoenix and Prescott were found to be unreasonable to the extent that they exceeded the rates to the main-line junction points by more than 5 cents. As a result, on May 1, 1916, the rates from California to Phoenix and Prescott became 60 cents, minimum 60,000 pounds, and 65 cents, minimum 36,000 pounds. On June 25, 1918, the main-line

rates were increased 25 per cent to 69 and 75 cents, respectively, and the Phoenix and Prescott rates became 75 and 81.5 cents. Subsequently a flat increase of 22 cents was substituted for the percentage increase and the rates to main-line points became 77 and 82 cents on November 25, 1919, and to Phoenix and Prescott 82 and 87 cents on February 18, 1920.

On February 29, 1920, the carriers canceled the rates to main-line and branch-line points under the lower minimum weight published in connection with roads under Federal control and, as to such roads, increased the Phoenix and Prescott rate under the minimum of 60,000 pounds to 83.5 cents. This cancellation, as to nonfederal lines, was found justified in Sugar from California Points to Arizona, 58 I. C. C. 737.

On August 26, 1920, the rates on sugar from California, minimum 60,000 pounds, became 96.5 cents to main-line points and $1.045 to Phoenix and Prescott. In Phoenix Chamber of Commerce v. Director General, 62 I. C. C. 412, decided June 22, 1921, the Phoenix rate was found unreasonable to the extent that it exceeded 96.5 cents, and reparation was awarded on that basis. On June 27, 1921, the carriers reduced the main-line rates to 96 cents, and on September 17, 1921, that rate was established to both Phoenix and Prescott. All of these rates were reduced on July 1, 1922, to 86.5 cents.

In United Verde Mining Co. v. A., T. & S. F. Ry. Co., 88 I. C. C. 5, the rates on classes and commodities, including sugar, from California, among

other origin territories, to Clarkdale were found unreasonable to the extent that they exceeded the contemporaneous rates to Drake, and on October 16, 1922, the rate on sugar from California to Clarkdale was reduced from $1.16 to 86.5 cents.

In Sugar Cases of 1922, 81 I. C. C. 448, fourth-section relief authorized in Fourth Section Violations in Rates on Sugar, supra, permitting lower rates to Chicago, Ill., and other points in the Middle [12] West, than to intermediate points, was withdrawn. In the revision following this decision the rate to Chicago, minimum 80,000 pounds, became 84 cents, and this rate was established at intermediate points, including Gallup and main-line Southern Pacific and Santa Fe points in Arizona, but in connection with a minimum of 60,000 pounds. The same rate and minimum were established to Phoenix, Prescott, and Clarkdale.

In our original report in No. 14449 we again considered the rate from California points to Phoenix and found it to have been and to be unreasonable to the extent that it exceeded 79 and 71 cents, respectively, prior and subsequent to July 1, 1922. Reparation was awarded on that basis. The 71-cent rate was established to Phoenix and to intermediate points on the Southern Pacific and on the route of the Santa Fe over the Parker cut-off, effective February 25, 1925. In our original report in No. 14140, Solomon-Wickersham Co. v. S. M. V. R. R. Co., 101 I. C. C. 667, reopened and here before us on argument, the rate on sugar from California points to Bowie was found to have been and to be unreason-

able to the extent that it exceeded 83 and 75 cents, respectively, before and after July 1, 1922. Reparation was awarded on that basis. The reduced rate was established to Bowie and to Tucson, an intermediate point, effective October 27, 1925. The reduction to Bowie was 9 cents, and on the date named the Southern Pacific made reductions of the same amount to Safford and Globe, resulting in rates of 80.5 and 85.5 cents, respectively. No change was made in the Clifton rate of 94.5 cents.

Summarized, the present rates, minimum 60,000 pounds, are 71 cents to Yuma and Phoenix, 75 cents to Tucson and Bowie, 80.5 cents to Safford, 84 cents to Kingman, Williams, Flagstaff, Winslow, Holbrook, Prescott, Clarkdale, Bisbee, Douglas, and Gallup, 85.5 cents to Globe, and 94.5 cents to Clifton.

The general transportation conditions from California to Arizona are fully discussed in the cases cited and also in Arizona Corporation Commission v. A. E. R. R. Co., 113 I. C. C. 52, and will not be further discussed here. The latter case has since been reopened. In Arizona Cattle Growers Asso. v. A. Ry. Co., 101 I. C. C. 181, division 4 approved of prescribed rates on cattle, in carloads, from points in Arizona to points in California which were approximately 20 per cent higher than the corresponding rates for like distances in Oklahoma and Texas. The same level of rates was approved or prescribed in that case from branch-line as from main-line points in Arizona.

In Nos. 16742, 16770, and 16770 (Sub-Nos. 1 to 9) counsel asks reparation on shipments to Phoenix on

the basis of 71 cents, and contends that rates to the other destinations should be graded like [13] the rate to Bowie prescribed in the first report in No. 14149, or else that there should be reasonable groupings. In Nos. 17549, 17549 (Sub-No. 1), and 17466 counsel contends that the origin group should be divided into two parts, the first to include Los Angeles, Dyer, Los Alamitos, San Pedro, and Oxnard, and the second San Francisco, Betteravia, Spreckles, Tracy, Alvarado, and Crockett. The principal counsel in the latter cases is also counsel for complainants in No. 16770 (Sub-Nos. 6, 7, and 8). The rates now suggested from the proposed southern group are 54 cents to Phoenix, Tucson, and Clarkdale, 59 cents to Bisbee, and 64 cents to Clifton, and rates 10 cents higher from the proposed northern group.

The rate of 71 cents to Phoenix prescribed in the original report in No. 14449 was based on a distance of 625 miles, which is approximately one-half of the sum of the short-line distances from Los Angeles and San Francisco. Reference was made in that report to the fact that under the distance scale on sugar prescribed in Memphis-Southwestern Investigation, 77 I. C. C. 473, for application in the general territory comprising Louisiana west of the Mississippi River, Arkansas, and southern Missouri, the rate for 625 miles is 58 cents. The rate of 71 cents prescribed is about 121 per cent of 58 cents. The rates proposed by complainants are lower than 121 per cent of the Memphis-Southwestern scale, and in justification thereof complainants point to the fact

that the minimum weight prescribed in connection with that scale is 36,000 pounds, as compared with 60,000 pounds under the rates assailed. In Oklahoma Traffic Asso. v. A. G. S. R. R. Co., 113 I. C. C. 635, the Memphis-Southwestern scale was prescribed on sugar from New Orleans, La., and points in Louisiana taking the same rates, and from Sugarland and Texas City, Tex., to points in Oklahoma, subject to a minimum of 60,000 pounds.

Defendants are opposed to a disturbance of the origin grouping and to grading of rates at destination. They contend that because of the competitive situation the present origin and destination groupings are of advantage to producers and distributors of sugar. However, if the rates are to be graded at destination they favor breaking up the origin blanket into two groups. Defendants subscribe to a basis of rates from California to Arizona which is about 121 per cent of the rates for the same distances under the Memphis-Southwestern scale, provided that the rates to Arizona points are based upon the weighted-average haul.

As stated, the only California points at which cane sugar is refined are San Francisco and Crockett. The southern California distributors of beet sugar stock a limited amount of cane sugar in order to fill orders for mixed carloads containing certain varieties of sugar [14] not obtainable at beet-sugar refineries. The production of beet sugar in California during 1925 was as follows:

Producing Point	Quantity
	Tons
Dyer	9,095
Los Alamitos	2,010
Oxnard	15,310
Betteravia	18,559
Spreckles	30,066
Tracy	8,297
Alvarado	9,580
Total	92,917

The production at the southern California points of Dyer, Los Alamitos, and Oxnard was 28.43 per cent of the total production for the State during 1925. In addition there was a substantial movement of sugar by water to San Pedro, Calif.

During the past several years, due to blight, drought, and the use for other purposes of land formerly planted in beets, there has been a substantial diminution in the amount of beet sugar produced in southern California and, as a consequence, a reduction in the number of refineries. The following table, giving movements from California refineries on the Southern Pacific to destinations in Arizona and New Mexico and to El Paso, shows that there has been a substantial reduction, both in the volume of movement from southern California to the territory of destination described and in the ratio such tonnage bears to the tonnage from northern California:

	Northern California			Southern California		
	Cars	Tons	Per cent	Cars	Tons	Per cent
Year 1921	187	5,920	24	265	8,519	76
Year 1922	188	5,920	39.4	265	8,423	70.6
Year 1923	247	7,754	72.9	67	2,129	27.1
Year 1924	313	9,856	86	44	1,415	14
Year 1925	504	15,615	95.5	23	714	4.5

In addition to the above there were shipments of sugar from San Francisco over the Santa Fe to destinations on its own line west of Albuquerque. In 1925 they amounted to 107 cars, weighing 3,029 tons. This additional tonnage changes the percentages for 1925 to 96.3 per cent from northern California and 3.7 per cent from southern California. Of the total of 611 cars from northern California, 227 moved from San Francisco and 370 from Crockett. The weight of the shipments from these two points aggregated 18,490 tons. Only 14 cars moved from other northern California points, of which 11 moved from Spreckles and 3 from Betteravia.

We have upon this record no serious contention from producers, distributors, or consumers that a breaking up of the present exten- [15] sive origin and destination groupings would be detrimental to their interests. Bearing in mind the length of time during which the present California group has existed and the fact that until recent years the movement has been substantial from both northern and southern California, we do not find that group as such to have been or to be unreasonable; but in view

of the fact that most of the movement now is from two of the most distant points of shipment, an origin group approximately 500 miles in length is no longer justified. A more reasonable adjustment for the future would seem to require the breaking up of the origin territory into two groups, the northern group extending from San Francisco and Crockett on the north to Spreckles on the south, and the southern group extending from Betteravia on the north to Dyer on the south.

Since the hearings in these cases we have decided Consolidated Southwestern Cases, 123 I. C. C. 203, in which new distance scales of rates were prescribed for application on classes and commodities generally throughout the Southwest. The scale on sugar prescribed in those cases, hereinafter referred to as the southwestern scale, is 30 per cent of the first-class rates therein prescribed and will apply in connection with a minimum weight of 60,000 pounds. The following table shows the average short-line distances from the southern and northern groups to points or groups of destination and compares the rates proposed by certain of complainants with rates on basis of 120 per cent of the southwestern scale for like distances:

	From southern group			From northern group		
	Distance	Complainants' proposed rates	120% of southwestern rates	Distance	Complainants' proposed rates	120% of southwestern rates
	Miles	Cents	Cents	Miles	Cents	Cents
From Group 1 to Yuma, Ariz.	267	40	45.5	637	50	72
From Group 2 to Kingman, Ariz.	388	47	56.5	645	57	73
From Group 3 to Phoenix, Ariz.	467	55	61	749	65	79
From Group 4 to—						
Tucson, Ariz.	519	.....	.....	847	.....	.....
Prescott, Ariz.	526	.....	.....	782	.....	.....
Williams, Ariz.	527	.....	.....	783	.....	.....
Flagstaff, Ariz.	561	.....	.....	818	.....	.....
Clarkdale, Ariz.	563	.....	.....	820	.....	.....
Group average	539	55	65	810	65	83
From Group 5 to—						
Winslow, Ariz.	619	.....	.....	876	.....	.....
Bisbee, Ariz.	628	.....	.....	956	.....	.....
Bowie, Ariz.	634	.....	.....	961	.....	.....
Douglas, Ariz.	643	.....	.....	971	.....	.....
Holbrook, Ariz.	652	.....	.....	909	.....	.....
Group average	635	59	72	935	69	89
From Group 6 to—						
Safford, Ariz.	674	60	74.5	1,001	70	92.5
From Group 7 to—						
Gallup, N. Mex.	747	.....	.....	1,004	.....	.....
Clifton, Ariz.	753	.....	.....	1,081	.....	.....
Globe, Ariz.	758	.....	.....	1,085	.....	.....
Group average	752	64	79	1,057	74	95

No. 16670 (Sub-No. 7) brings in issue the reasonableness of the rates from Colorado and Kansas refineries to Gallup, and contains a prayer for reparation on shipments subsequent to March 31, 1923. Prior to June 25, 1918, the rate on sugar from transcontinental Group E, which includes New Orleans, to Pacific coast points was 85 cents, minimum 60,000 pounds, and this rate applied as maximum from Kansas and Colorado points. The general increases and reduction resulted in rates from Colorado and Kansas, respectively, to Arizona points on the Santa Fe of $1.195 and $1.28, the difference resulting from general increases of 25 and 33 1/3 per cent, respectively, from Colorado and Kansas on August 26, 1920. At the time of the hearing the fifth-class rate of $1.145 was applicable on sugar from Colorado refineries to Gallup. At that time a commodity rate of 75 cents applied from Colorado points to Albuquerque, and on August 1, 1925, the present commodity rate of 84 cents, minimum 60,000 pounds, was established from the same points to Gallup. The present rate to Albuquerque is 76 cents, and the same rate applies from Denver and Pueblo, Colo., to El Paso. To Fort Worth, Tex., the rate is 72 cents, minimum 36,000 pounds.

The record fails to show any movement, actual or prospective, from Kansas, and the rates from that State will not be further considered.

The Colorado points of origin are shown by complainant as including Denver, Fort Collins, Greeley, Holly, Lamar, Longmont, Loveland, Las Animas, Lupton, Rocky Ford, Swink, and Windsor. The Santa Fe, which is the only carrier serving the Colorado group named as defendant herein, carries

rates to points on its line in Arizona and New Mexico only from Holly, Lamar, Las Animas, Rocky Ford, and Swink. The average distance from the group to Gallup is shown by complainants as 625 miles. Complainant in No. 16670 (Sub-No. 7) showed only seven shipments from Colorado to Gallup since March 31, 1923, six from Swink, and one from Rocky Ford.

The rates herein prescribed under section 1 will remove any undue prejudice which may exist in the rates assailed, and no findings with respect to the allegations under section 3 are necessary.

The evidence shows that all of the complainants, except the C. N. Cotton Company, made or received shipments of sugar as described, and paid and bore the charges thereon.

Defendants call attention to the fact that in our original report in No. 14449 we awarded reparation on shipments which moved to Phoenix on a rate 0.5 cent less than the rate prescribed as reasonable by us from and to the same points in Phoenix Chamber of Com- [17] merce v. Director General, supra, referred to as the First Phoenix case, and that the period of reparation in the former case extended back approximately four months prior to the date when the latter case was decided. Defendants contend that they should not be required to pay reparation on shipments which moved under rates approved or prescribed by us. We have several times announced that the doctrine of res adjudicata is not applied by us. Goss v. Director General, 73 I. C. C. 649. We reserve the right,

upon a more comprehensive record, to modify our previous findings, whether in the same or a previous case, upon matters directly in issue before us as to which it clearly appears that our previous findings would not accord substantial justice under the laws which we administer. We have such a case here. For the first time the record before us is comprehensive in the evidence which it contains bearing upon the reasonableness of the rates assailed. Upon this record we reach the conclusion that the rate prescribed in the first Phoenix case, during the period embraced in these complaints, was unreasonable and that a lower rate would have been reasonable during that period. If we are within our authority in finding that a lower rate would have been reasonable, then it must follow that shippers who paid the freight charges at the higher rate paid charges which were unreasonable, and are entitled to reparation upon adequate proof that they paid or bore such charges.

We find that the assailed rate, minimum 60,000 pounds, from Holly and other Santa Fe points in Colorado grouped therewith to Gallup was, is, and will be unreasonable to the extent that it exceeded, exceeds, or may exceed 72 cents. We further find that the assailed rates, minimum 60,000 pounds, from California points were, are, and will be unreasonable to the extent that they exceeded, exceed, or may exceed, respectively, the following, in cents per 100 pounds:

Prior to July 1, 1922, to Phoenix 79 cents from the Southern California group and 81 cents from the northern California group and to Bowie 83

cents from the southern California group and 93 cents from the northern California group; on and between July 1, 1922, and the effective date of the rates herein prescribed for the future, from the southern California group and the northern California group, respectively, *66* and 66 cents to Yuma, 68 and 69 cents to Kingman, 71 and 73 cents to Phoenix, 73 and 77 cents to Prescott, Williams, Tucson, Flagstaff, and Clarkdale, 75 and 84 cents to Winslow, Holbrook, Bisbee, Bowie, and Douglas, 77 and 87 cents to Safford, and 79 and 89 cents to Gallup, Clifton, and Globe; and for the future as follows: [18]

To—	From southern California group	From northern California group
	Cents	Cents
Yuma, Ariz.	46	66
Kingman, Ariz.	57	69
Phoenix, Ariz.	61	73
Tucson, Ariz.	65	77
Prescott, Ariz.	65	77
Williams, Ariz.	65	77
Flagstaff, Ariz.	65	77
Clarkdale, Ariz.	65	77
Winslow, Ariz.	72	84
Bisbee, Ariz.	72	84
Bowie, Ariz.	72	84
Douglas, Ariz.	72	84
Holbrook, Ariz.	72	84
Safford, Ariz.	75	87
Gallup, N. Mex.	79	89
Clifton, Ariz.	79	89
Globe, Ariz.	79	89

We further find that complainants, except the C. N. Cotton Company, made shipments as described at the rates herein found to have been unreasonable; that they paid and bore the charges thereon and were damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the rates herein found to have been reasonable; and that they are entitled to reparation, with interest. Complainants should comply with Rule V of the Rules of Practice. No reparation orders have been issued in Nos. 14449 and 14140, and complainants in those cases should submit to the carriers new statements in compliance with Rule V referred to.

Our original order in No. 14449 and the order of division 3 in No. 14140 will be modified in conformity with the foregoing conclusions, and appropriate orders for the future will be entered in other cases disposed of in this report.

TAYLOR, Commissioner, concurring in part:

I dissent from so much of this report as finds the rates unreasonable in the past and awards reparation.

COMMISSIONER PORTER did not participate in the disposition of this case. [19]

ORDERS.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 12th day of March, A. D. 1928

No. 16770

Bashford-Burmister Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Bay Transport Company

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No. 16770 (Sub-No. 1)

Central Commercial Company

v.

Same

No. 16770 (Sub-No. 2)

Wheeler Perry Company

v.

Santa Maria Valley Railroad Company and Southern Pacific Company

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No. 16770 (Sub-No. 3)

T. F. Miller Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Bay Transport Company

No. 16770 (Sub-No. 4)

E. F. Sanguinetti

v.

Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Bay Transport Company [20]

No. 16770 (Sub-No. 5)

Arizona Grocery Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Bay Transport Company

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No. 16770 (Sub-No. 6)

Arizona Wholesale Grocery Company

v.

Arizona Eastern Railroad Company; Pacific Elcetric Railway Company; Santa Maria Valley Railroad Company; and Southern Pacific Company

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No. 16770 (Sub-No. 7)

C. N. Cotton Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Pacific Electric Railway Company; Rio Grande, El Paso and Santa Fe Railroad Company; Santa Maria Valley Railroad Company; and Southern Pacific Company

No. 16770 (Sub-No. 8)

Babbitt Brothers Trading Company; Arizona Stores Company; Babbitt Brothers Company; and Babbitt Brothers

v.

Same

No. 16770 (Sub-No. 9)

Wm. H. Dagg Mercantile Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Bay Transport Company

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No. 17549

Phelps Dodge Mercantile Company

v.

The Atchison, Topeka & Santa Fe Railway Company; El Paso & Southwestern Railroad Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Southern Pacific Company [21]

No. 17549 (Sub-No. 1)

Baffert & Leon

v.

The Atchison, Topeka & Santa Fe Railway Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Southern Pacific Company

No. 17466

United Verde Extension Mining Company

v.

Same

No. 17781

Simpson-Ashby Company

v.

Southern Pacific Company

These cases being at issue upon complaints, as amended, and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before June 11, 1928, and thereafter to abstain, from publishing, demanding, or collecting rates for the transportation of sugar, in carloads, from points in California to points in Arizona, referred to in the next succeeding paragraph hereof, and to Gallup, N. Mex., and from points in Colorado, referred to in the second succeeding paragraph hereof, to Gallup, which shall exceed the rates hereinafter prescribed.

It is further ordered, That said defendants, according as they participate in the transportation, be,

and they are hereby, notified and required to establish, on or before June 11, 1928, upon notice to this commission and to the general public by not less than 15 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of sugar, in carloads, from the following California groups, as defined in the report made a part hereof, to the Arizona and New Mexico destinations named below, rates, minimum weight 60,000 pounds, which shall not exceed the following, in cents per 100 pounds: [22]

To—	From southern California group	From northern California group
	Cents	Cents
Yuma, Ariz.	46	66
Kingman, Ariz.	57	69
Phoenix, Ariz.	61	73
Tucson, Ariz.	65	77
Prescott, Ariz.	65	77
Williams, Ariz.	65	77
Flagstaff, Ariz.	65	77
Clarkdale, Ariz.	65	77
Winslow, Ariz.	72	84
Bisbee, Ariz.	72	84
Bowie, Ariz.	72	84
Douglas, Ariz.	72	84
Holbrook, Ariz.	72	84
Safford, Ariz.	75	87
Gallup, Ariz.	79	89
Clifton, Ariz.	79	89
Globe, Ariz.	79	89

It is further ordered, That said defendants in No. 16670 (Sub-No. 7), according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before June 11, 1928, upon notice to this commission and to the general public by not less than 15 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of sugar, in carloads, from Holly, Lamar, Rocky Ford, and Swink, Colo., and other points on the Atchison, Topeka & Santa Fe Railway in Colorado taking the same rates, to Gallup, N. Mex., a rate which shall not exceed 72 cents per 100 pounds, minimum weight 60,000 pounds.

And it is further ordered, That these orders shall continue in force until the further order of the commission.

SUPPLEMENTAL ORDERS

No. 14449

Traffic Bureau of the Phoenix Chamber of Commerce; Haas-Baruch & Company; Hall-Pollock Company; The Melczer Company; and James A. Dick Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Arizona Eastern Railroad Company

No. 14140

Solomon-Wickersham Company

v.

Santa Maria Valley Railroad Company and Southern Pacific Company

These cases having been reopened for oral argument jointly with No. 16742, Traffic Bureau of the Phoenix Chamber of Commerce et al. v. A., T. & S. F. Ry. Co. et al., and cases consolidated therewith, and such oral argument having been had, and the commission having, on the date hereof, made and filed a new report containing its find- [23] ings of fact and conclusions thereon, which said report, together with the previous reports herein, 95 I. C. C. 244 and 101 I. C. C. 667, are hereby referred to and made a part hereof:

It is ordered, That the order entered in No. 14449 on January 6, 1925, and the order entered in No. 14140 on July 17, 1925, be, and they are hereby, modified so that the second and third paragraphs thereof will read, respectively, as follows:

It is ordered, That the above-named defendants in No. 14449, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before June 11, 1928, and thereafter to abstain, from publishing, demanding, or collecting rates for the transportation of sugar, in carloads, from points in California to Phoenix, Ariz., which shall exceed the rates prescribed in the next succeeding paragraph hereof.

It is further ordered, That said defendants, according as they participate in the transportation, be,

and they are hereby, notified and required to establish, on or before June 11, 1928, upon notice to this commission and to the general public by not less than 15 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of sugar, in carloads, rates to Phoenix, Ariz., minimum weight 60,000 pounds, which shall not exceed 61 cents per 100 pounds from points in the southern California group, as defined in the report of this date made a part hereof, and 73 cents per 100 pounds from points in the northern California group, as defined in the said report.

It is ordered, That the above-named defendants in No. 14140, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before June 11, 1928, and thereafter to abstain, from publishing, demanding, or collecting rates for the transportation of sugar, in carloads, from points in California to Bowie, Ariz., which shall exceed the rates prescribed in the next succeeding paragraph hereof.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before June 11, 1928, upon notice to this commission and to the general public by not less than 15 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of sugar, in carloads, rates to Bowie, Ariz., minimum weight 60,000 pounds, which shall

not exceed 72 cents per 100 pounds from the southern California group, as defined in the report of this date made a part hereof, and 84 cents per 100 pounds from the northern California group, as defined in the said report.

And it is further ordered, That these supplemental orders shall continue in force until the further order of the commission.

By the commission.

[Seal] GEORGE B. McGINTY,
Secretary.

A true copy:

GEORGE B. McGINTY,
Secretary. [24]

EXHIBIT "B"

...M NO. 80 ... OF BAFFERT & LEON UNDER THE DECISION OF THE INTERSTATE COMMERCE COMMISSION IN DOCKET NO. 17...
...GHA. I COVERING SHIPMENTS OF SUGAR ORIGINATING AT CROCKETT AND OAKLEY, CALIFORNIA DESTINED TUCSON, ARIZONA.

ROUTING: SOUTHERN PACIFIC DIRECT.

Date of Shipment	Date of Delivery or Tender of Delivery	Date Charges Paid	Car Initials	Car Number	Weight	As Checked Rate	As Checked Charges	Should Be Weight	Should Be Rate	Should Be Charges	Overcharge
Feb. 17, 1925	Feb. 25, 1925	Feb. 26, 1925	SOU	19715[illegible]	80,531	84	508.46	80,531	77	486.06	22.40
March 22, 1928	March 26, 1928	March 28, 1928	SP	238051	80,480	75	453.45	80,480	78	441.36	12.09
April 24, 1928	April 27, 1928	April 28, 1925	SP	239261	80,450	75	453.38	80,450	73	441.25	12.13
July 17, 1925	July 21, 1925	July 22, 1925	SP	16776[illegible]	80,489	84	507.94	80,489	73	441.42	66.52
May 6, 1924	May 1 2,1924	May 14, 1 924	GHSA	3[illegible]56	80,507	84	508.28	80,507	77	486.90	42.38
Sept. 18, 1924	Aug. 19, 1924	Aug. 20, 1924	SP	845151	80556	84	508[illegible]	80556	77	486.30	42.36
Feb 4, 1925	Feb. 9, 1925	Feb. 11, 1925	SP	852381	80,527	84	508.43	80527	77	486.06	42.37
Feb. 27, 1925	March 4, 1925	Mar ch 4, 1925	SP	2[illegible]/19	80,593	84	508.[illegible]	80,593	77	486.[illegible]	42.41
March 14, 1925	March 20, 1925	March 21, 1925	SP	1[illegible]804	80,491	84	508.12	80,491	77	486.78	42.34
Mar ch 31, 1925	April 4, 1925	April 8, 1925	TP	34239	80,509	84	508.28	80,509	77	486.92	42.36
April 21, 1925	April 27, 1925	April 30, 1925	SP	8[illegible]672	80,553	84	508.85	80,553	77	486.26	42.39
May 2, 1925	May 8, 1925	May 13, 1925	SP	2[illegible]850	80,534	84	508.49	80,534	77	486.11	42.38
May 15, 1925	May 20, 1925	May 23, 1925	GHSA	38[illegible]38	[illegible]86	84	508.06	80,486	77	486.[illegible]	42.34
June 10, 1925	June 16, 1925	June 17, 1925	SP	27[illegible]95	[illegible],[illegible]5	84	508.41	80,526	77	486.[illegible]	42.37
June 26, 1925	July 1, 1925	July 3, 19 25	CS	18[illegible]23	[illegible],[illegible]7	84	508.34	80,517	77	486.[illegible]	42.36
Aug 4, 1925	Aug. 10, 1925	Aug. 12, 1925	SP	305181	[illegible],534	84	508.49	80,534	77	486.[illegible]	42.38
Aug. 19, 1925	Aug. 24, 1925	Aug. 26, 1925	CMSTP	79798	[illegible],520	84	508.37	80,520	77	486.[illegible]	42.37
Sept. 10, 1925	Sept. 15, 1925	Sept. 16, 1925	SP	29581[illegible]	80,553	84	508.65	80,553	77	486.26	42.39
TOTAL							53,04[illegible].47			$8,315.19	[illegible]

The undersigned hereby certifies that this statement has been checked against the records of this company and found correct [illegible] prior to September 1924 is certified correct only as shown by attached freight bill. Other records destroyed.

Date 12-19-25

THE SOUTHERN PACIFIC RAILROAD COMPANY,
Collecting Carrier, Defendant.

By _____
Auditor of Freight Claims

Aud.

Baffert & Leon
Tucson, Arizona

By: CHAS. E. BLAINE,
Commerce Counsel,
411-33 Home Builders,
Phoenix, Arizona
June 18, 1926

not exceed 72 cents per 100 pounds from the southern California group, as defined in the report of this date made a part hereof, and 84 cents per 100 pounds from the northern California group, as defined in the said report.

And it is further ordered, That these supplemental orders shall continue in force until the further order of the commission.

By the commission.

[Seal] GEORGE B. McGINTY,
Secretary.

A true copy:
GEORGE B. McGINTY,
Secretary. [24]

...M NO. ...
...SUB. ...SSION IN DOCKET NO. 19545
DESTINED TUCSON, ARIZONA.

Date of Shipment	Charges Collected	Weight	Should Be Rate	Should Be Charges	Reparation on basis of the Commission's Decision
17,					
22,	8.48	60,531	77	466.09	42.37
24,	3.45	60,460	73	441.36	12.09
17,	3.38	60,450	73	441.29	12.09
6,	7.94	60,469	73	441.42	66.52
18,	8.26	60,507	77	465.90	42.36
4,	869	60556	77	466.30	42.39
27,	8.43	60527	77	466.06	42.37
14,	8.98	60,593	77	466.57	42.41
31,	8.12	60,491	77	465.78	42.34
21,	8.28	60,509	77	465.92	42.36
2,	6.65	60,553	77	466.26	42.39
15,	8.49	60,534	77	466.11	42.38
10,	8.08	60,486	77	465.74	42.34
26,	8.41	60,526	77	466.04	42.37
4,	8.34	60,517	77	465.98	42.36
19,	8,49	60,534	77	466.11	42.38
10,	8.37	60,520	77	466.00	42.37
.....	8.65	60,553	77	466.26	42.39
	1.47			$8,315.19	$726.28

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Sept 13 19

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THE SOUTHERN
Co
By
Audit

. BLAINE,
ce Counsel,
3 Home Builders,
x, Arizona
, 1 928

March 25, 1929.

State of Arizona,
County of Pima.—ss.

I, F. J. Baffert, Co-Partner of the firm of Baffert & Leon, Tucson, Arizona, do solemnly swear that I have reviewed the eighteen (18) freight bills as listed on Rule V statement as rendered by Mr. Chas. E. Blaine, Commerce Counsel, with his claim No. 5058 of Baffert & Leon under the decision of the Interstate Commerce Commission in Docket No. 17549, Sub 1, covering shipments of sugar originating at Crockett, and Oxnard, California destined Tucson, Arizona.

Furthermore, that Baffert & Leon paid and bore the freight charges shown thereon.

F. J. BAFFERT.

State of Arizona,
County of Pima.—ss.

Subscribed and sworn to before me this 29th day of March, 1929.

J. H. BAFFERT
Notary Public, Pima County, State of Arizona.
My Commission expires: Aug. 25th, 1930. [27]

EXHIBIT "C"

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 7th day of September A. D. 1929.

No. 17549

Phelps Dodge Mercantile Company

v.

The Atchison, Topeka & Santa Fe Railway Company, et al.

No. 17549 (Sub-No. 1)

Baffert & Leon

v.

Same

It appearing, That on March 12, 1928, the commission entered its report in the above-entitled proceeding, which report is hereby referred to and made a part hereof, and this proceeding now coming on for further consideration on the question of reparation, and the parties having filed agreed statements with respect to the shipments in question, showing, among other things, the dates on which payment of the charges assailed was made; we find that complainants shown in the following table are entitled to awards of reparation from the defendants named below in the amounts set opposite their respective names, with interest.

Complainants	Defendants	Amounts
Phelps Dodge Mercantile Company	Southern Pacific Company and El Paso & Southwestern Railroad Company	$2510.46
Do	Southern Pacific Company	891.43
T. J. Baffert and A. S. Leon, copartners, trading under the firm name of Baffert & Leon	Southern Pacific Company	726.28

It is therefore ordered, That the defendants, named in each of the groups shown in the above table, be, and they are hereby authorized and directed to pay unto the complainants shown opposite said groups, on or before October 22, 1929, the amounts set opposite their respective names in said table, with interest thereon at the rate of six per cent per annum, from the respective dates of payment of the charges assailed shown in the aforesaid agreed statements, as reparation on account of unreasonable rates charged for the transportation of numerous carloads of sugar from California points to destinations in Arizona, and from California and Colorado points to Gallup, N. Mex.

By the commission.

GEORGE B. McGINTY,

(Seal Interstate Commerce Commission) Secretary.

A true copy:

GEORGE B. McGINTY,
Secretary. [28]

[Endorsed]: Filed Feb 7 1930. [29]

In the District Court of the United States,
in and for the District of Arizona.

L 844 Phx

AT LAW

WHEELER-PERRY COMPANY, a corporation,
Plaintiff.

vs.

SOUTHERN PACIFIC COMPANY, a corporation, and SANTA MARIA VALLEY RAILROAD COMPANY, a corporation,
Defendants.

COMPLAINT.

for reparations on freight charges

Plaintiff by its attorneys, Elliott and Snell, complains of the defendants and for its cause of action alleges:

I.

That at all times hereinafter mentioned plaintiff was a corporation, organized under the laws of the State of Arizona and qualified to do business in said State of Arizona.

II.

That at all times hereinafter mentioned the defendants, Southern Pacific Company and Santa Maria Valley Railroad Company, were and now are railroad corporations engaged in the operation of railroads and railroad lines for the transportation of freight and interstate commerce, and the Santa Maria Valley Railroad Company is a connecting

carrier with the said defendant Southern Pacific Company, and between which there was an agreement for a joint line, and arrangements for a continuous carriage of interstate shipments over their respective lines.

III.

That between the 14th day of September, 1923 and the 1st day of May, 1928 there was shipped by the above named plaintiff to Tucson, Arizona, over the lines of said defendants and entered Tucson over the lines of the said Southern Pacific Company twenty-three (23) carloads of sugar; that the shipments [32] originated at Betteravia, Oxnard, Crockett, and San Francisco, California, as shown on Exhibit "A" attached hereto and made a part hereof.

IV.

That the said defendant Southern Pacific Company charged this plaintiff and this plaintiff was compelled to and did pay the said Southern Pacific Company, upon all of said shipments from said points in California, from the 14th day of September, 1923 to the 1st day of May, 1928, inclusive, the following freight charges, to wit:

For a shipment made on September 14, 1923 from Betteravia, California, 86½ cents per hundred pounds;

For a shipment made on October 13, 1923, as shown on Exhibit "A" attached hereto and made a part hereof, 86½ cents per hundred pounds;

For a shipment made on April 28, 1928, as shown on Exhibit "A" attached hereto and made a part hereof, 75 cents per hundred pounds;

For shipments made between February 27, 1923 and December 28, 1923, inclusive, from Crockett and San Francisco, California, 86½ cents per hundred pounds;

For shipments made between January 24, 1924 and July 13, 1925, inclusive, from Crockett and San Francisco, California, 84 cents per hundred pounds;

all as will more particularly appear from Exhibit "A" attached hereto and made a part hereof; that all of said shipments were made on through bills of lading, from said points of origin to said point of destination, and that the said freight charges as above set forth per hundred pounds were and are unreasonable, as to this plaintiff, and a violation of the Interstate Commerce Act of February 4, 1887, and Acts of Congress amendatory thereto, and that the just and reasonable freight rates which should have been charged on all of said shipments from said points of origin in California to said point of destination in [33] Arizona after the 1st day of July, 1922 was 73 cents per hundred pounds from Oxnard and Betteravia and 77 cents per hundred pounds from Crockett and San Francisco, California.

V.

That prior to the filing of this complaint plaintiff filed its petition and complaint with and before

the Interstate Commerce Commission of the United States, alleging that the rates and charges on all of said shipments from said points of origin in California to said point of destination in Arizona were unjust and unreasonable, as to the plaintiff, and that thereafter the above named defendants filed their answer with and before the Interstate Commerce Commission, said cause being docketed under Docket No. 16770.

VI.

That the said Interstate Commerce Commission made, issued and filed its findings of fact on the 12th day of March, 1928; that said Commission found that said rates of 75 cents, 84 cents and 86½ cents per hundred pounds as above set forth on said shipments from said points of origin in California to said point of destination in Arizona were unreasonable, as to the plaintiff, to the extent that they exceeded a rate and charge of 73 cents per hundred pounds from Betteravia and Oxnard, California and 77 cents per hundred pounds from Crockett and San Francisco, California on and after July 1, 1922, and said Commission and said report and findings found that the plaintiff herein was entitled to reparations on said shipments from said points of origin in California to said point of destination in Arizona, and to interest thereon; and that said report and said findings of said Commission are duly reported and recorded in 140 I. C. C. 171; that said Commission required and directed that said complainant should comply with Rule V of the

rules and regulations of the Interstate Commerce Commission, which rule required a statement of the shipments and dates on which charges therefor were paid: the car initials and numbers; the points of origin; the routes over which the shipments moved; the weights of shipments; the rates charged; the amount collected; the rates which [34] should have been charged; the amount which should have been collected; and the differences between the charges existing and those which would have accrued upon the basis of rates found reasonable by the Commission: that in pursuance of said requirements of the Interstate Commerce Commission the plaintiff herein did, on or about the 28th day of June, 1928, properly certify a statement under said rule and transmitted same to the defendant Southern Pacific Company, and same was thereafter certified to by the Southern Pacific Company and was thereafter transmitted by the Southern Pacific Company to the Interstate Commerce Commission; a copy of which statement is attached hereto marked Exhibit "A" and made a part hereof.

VII.

Thereafter and on the 13th day of April, 1931 the Interstate Commerce Commission duly made and published its order directing and requiring the defendants herein to pay unto said plaintiff, Wheeler-Perry Company, the following sums, to wit:

Santa Maria Valley Railroad Company	$ 81.60
Southern Pacific Company	1,090.09

together with interest thereon at the rate of six per

cent (6%) per annum from the respective dates of payment of the charges shown on Exhibit "A" attached hereto and made a part hereof, the said sums to be paid on or before the 28th day of May, 1931, said reparations being on account of the unreasonable rates charged for the transportation of certain carload shipments of sugar from points in California to Tucson, Arizona, as will more particularly appear from the copy of said order hereto attached marked Exhibit "B" and made a part hereof.

VIII.

That said defendants have failed and refused to pay said reparation or any part thereof, either of principal or interest, though request and demand has been made heretofore by the plaintiff on the defendants for the payment of said reparation. [35]

IX.

That by reason of said unreasonable rates and charges and the payment thereof by the plaintiff, and by reason of the refusal of said defendants to pay said reparations awarded by the Interstate Commerce Commission, the plaintiff has been damaged in the sum of One Thousand One Hundred Seventy-one and 69/100 Dollars ($1,171.69), together with interest thereon at the rate of six per cent (6%) per annum from the respective dates of payment of the charges as shown in Exhibit "A" attached hereto and made a part hereof, no part of which has ever been paid.

X.

That the sum of Seven Hundred Fifty Dollars ($750.00), which is reasonable attorneys' fees, may be allowed by the court in this action.

WHEREFORE, plaintiff demands judgment in its favor and against the defendants for the sum of One Thousand One Hundred Seventy-one and 69/100 Dollars ($1,171.69), together with interest thereon from the respective dates of payment as above set forth and as herein contained, together with Seven Hundred Fifty Dollars ($750.00) as attorneys' fees, and for plaintiff's costs and disbursements in this action; and plaintiff prays that process may issue herein.

ELLIOTT & SNELL,
Attorneys for Plaintiff. [36]

CLAIM NO. 5180 OF THE WHEELER PERRY COMPANY UNDER THE DECISION OF THE INTERSTATE COMMERCE COMMISSION IN DOCKET NO. 18770 (SUB 2) COVERING SHIPMENTS OF SUGAR ORIGINATING AT CHRISTIANA, CALIFORNIA DESTINED TUCSON, ARIZONA ROUTED SANTA MARIA VALLEY RAILROAD COMPANY— SOUTHERN PACIFIC COMPANY.

Date of Shipment	Date of Delivery or tender of Delivery	Date Charges Paid	Car Initials	Car Number	Weight	As Charged Rate	As Charged Charges	Weight	Should Be Rate	Should Be Charges	Application on basis of Commission's Decision
Sept. 14, 1933	Sept. 16, 1933	Sept. 17, 1933	SP	353.0	80480	85½	$343.59	80480	73	$311.89	$31.80

The undersigned hereby certifies that this statement has been checked against the records of this company and found correct.

Date

SANTA MARIA VALLEY RAILROAD COMPANY,
Collecting Carrier, Defendant,

By: [signature]

Concurred in:

SOUTHERN PACIFIC COMPANY,

By: _____

WHEELER PERRY COMPANY,
Tucson, Arizona.

By [signature illegible]
Traffic Counsel,
Arizona Home Builders' Bldg.
Phoenix, Arizona.
June 20, 1934.

EXHIBIT "A"

X.

That the sum of Seven Hundred Fifty Dollars ($750.00), which is reasonable attorneys' fees, may be allowed by the court in this action.

WHEREFORE, plaintiff demands judgment in its favor and against the defendants for the sum of One Thousand One Hundred Seventy-one and 69/100 Dollars ($1,171.69), together with interest thereon from the respective dates of payment as above set forth and as herein contained, together with Seven Hundred Fifty Dollars ($750.00) as attorneys' fees, and for plaintiff's costs and disbursements in this action; and plaintiff prays that process may issue herein.

ELLIOTT & SNELL,
Attorneys for Plaintiff. [36]

CLAIM NO. 8121 OF WHEELER-PERRY COMPANY UNDER THE DECISION OF THE INTERSTATE COMMERCE COMMISSION IN DOCKET NO. 16770 (SUB 2) COVERING SHIPMENTS OF SUGAR ORIGINATING AT OAKLAND, CROCKETT, AND SAN FRANCISCO, CALIFORNIA DESTINED TUCSON, ARIZONA ROUTED SOUTHERN PACIFIC COMPANY.

Date of Shipment	Date of Delivery or tender of Delivery	Date Charges Paid	Initials	Number	Weight	As Charged Rate	As Charged Charges	As Should Be Weight	As Should Be Rate	As Should Be Charges	Reparation on basis of Commission's Decision
Oct. 13, 1923	Oct. 17, 1923	Oct. [illegible], 1923	SP	[illegible]	80488	83½	$543.00	80488	75	$441.42	$101.64
April 28, 1924	May 1, 1924	May 4, 1924	SP	88005	80780	78	485.83	80780	75	443.43	14.15
July 8, 1925	July 13, 1925	July 14, 1925	SP	84807	80817	84	509.15	80 17	75	445.50	63.66
Jan. 24, 1924	Jan. 28, 1924	Jan. 28, 1924	PFE	13015	81075	84	513.03	81078	77	470.31	42.72
March 11, 1924	March 17, 1924	March 20, 1924	SLSF	1-38511	80848	84	537.98	80848	77	473.91	44.01
June 6, 1924	June 11, 1924	June 12, 1924	CHSA	38872	80860	84	509.33	80860	77	534.23	46.57
Aug. 19, 1924	Aug. 25, 1924	Aug. 27, 1924	CP	80508	80863	84	509.46	80863	77	467.03	42.45
Sept. 25, 1924	Oct. 1, 1924	Oct. 4, 1924	SP	88035	81780	84	515.85	81780	77	475.73	43.25
Feb. 6, 1925	Feb. 10, 1925	Feb. 11, 1925	NPCY	88486	80859	84	513.06	80859	77	465.36	42.66
April 16, 1925	April 24, 1925	April 27, 1925	SP	88881	81707	84	513.33	81707	77	475.14	43.19
May 12, 1925	May 16, 1925	May 20, 1925	UP	70287	81818	84	513.73	81818	77	473.87	43.06
Feb. 27, 1923	March 5, 1923	March 6, 1923	IC	31748	80450	84	508.69	80450	77	465.47	57.42
April 5, 1923	April 9, 1923	April 10, 1923	GHSA	34244	81109	84	509.77	81109	77	470.89	58.08
May 11, 1923	May 17, 1923	May 18, 1923	GHSA	37380	85670	84	537.16	85670	77	504.89	62.29
June 16, 1923	June 23, 1923	June 25, 1923	IC	8296309	80873	84	507.42	80873	77	469.49	57.93
Aug. 8, 1923	Aug. 14, 1923	Aug. 15, 1923	SP	18189	80711	84	506.10	80711	77	467.47	57.68
Sept. 12, 1923	Sept. 18, 1923	Sept. 21, 1923	SP	18673	80830	84	506.84	80830	77	467.08	57.60
Dec. 22, 1923	Dec. 28, 1923	Dec. 31, 1923	CHSA	37702	80887	84	506.40	80887	77	465.08	57.37
Nov. 1, 1924	Nov. 7, 1924	Nov. 10, 1924	SP	81650	81815	84	519.86	81815	77	473.93	43.27
Jan. 12, 1925	Jan. 17, 1925	Jan. 20, 1925	MP	13805	81839	84	518.93	81839	77	473.85	43.08
March 5, 1925	March 10, 1925	March 14, 1925	SP	88488	80710	84	509.98	80710	77	467.47	42.49
June 8, 1925	June 13, 1925	June 15, 1925	MTC	85184	80783	84	510.80	80783	77	466.03	40.55
TOTAL							11,481.40			$10,371.31	$1,090.09

The undersigned hereby certifies that this statement has been checked against the records of this company and found correct; shipments during prior to September 1923 are certified as correct only as shown by the attached freight bills; other records destroyed.

Sept 17 '25
Date

SOUTHERN PACIFIC COMPANY,
Collecting Carrier, Defendant.

By: _____, Agent.

WHEELER-Perry COMPANY,
Tucson, Arizona.

By: [illegible]
Commerce Counsel,
417-418 Valley Builders' Bldg.,
Phoenix, Arizona.
June 30, 1926.

March 25, 1929.

State of Arizona,
County of Pima.—ss.

I, L. A. Lohse, Manager for Wheeler-Perry Company, Tucson, Arizona, do solemnly swear that I have reviewed the twenty-three (23) freight bills as listed on Rule V statement by Chas. E. Blaine, Commerce Counsel, with his claims Nos. 5120 and 5121 for Wheeler-Perry Company, Tucson, Arizona, under the decision of the Interstate Commerce Commission in Docket No. 16770, Sub. 2, covering shipments of sugar originating at Betteravia, Oxnard, Crockett and San Francisco, California, destined Tucson, Arizona.

Furthermore, that Wheeler-Perry Company paid and bore the charges shown thereon.

L. A. LOHSE,
Manager.

State of Arizona,
County of Pima.—ss.

Subscribed and sworn to before me this 26th day of March, 1929.

NEVA P. CLAY,
Notary Public,
Pima County, State of Arizona.

My Commission expires March 30, 1930. [39]

EXHIBIT "B"

No. 16770

It appearing, That on March 12, 1928, the commission entered its report in the above-entitled proceedings, which report is hereby referred to and made a part hereof, and these proceedings now coming on for further consideration on the question of reparation, and the parties having filed agreed statements with respect to the shipments in question, showing among other things, the dates on which payment of the charges assailed was made; we find that complainants shown in the following table are entitled to awards of reparation from the defendants named below in the amounts set opposite their respective names, with interest.

Complainants	Defendants	Amounts
Bashford-Burmister Company	AT&SF	$2,554.40
Do	SP and AT&SF	170.15
Do	BT and AT&SF	146.58
The Central Commercial Company	AT&SF	959.48
Do	SP and AT&SF	1,438.21
Do	BT and AT&SF	459.54
Wheeler Perry Company	SMV	81.60
Do	SP	1,090.09
T. F. Miller Company	AT&SF	2,089.15
Do	SP and AT&SF	199.46
E. F. Sanguinetti	SP	2,367.57
Do	SMV and SP	123.92
Arizona Grocery Company	AT&SF	298.36
Do	SP and AT&SF	340.18
Do	BT and AT&SF	85.05
Solomon Wickersham Company	SP	472.99
Do	SP and AE	1,717.32
Arizona Wholesale Grocery Company	SP	317.22
Do	SP and AE	2,707.78
Babbitt Brothers Company	SP and AT&SF	1,938.45
Do	SMV; SP and AT&SF	62.50
Do	AT&SF	1,240.02
Arizona Stores Company	AT&SF	656.02
Do	SP and AT&SF	678.35
Wm. H. Dagg Mercantile Company	SP and AT&SF	100.14
Do	BT and AT&SF	15.12

It is therefore ordered, That the defendants, named in each of the groups shown in the above table, be, and they are hereby, authorized and directed to pay unto the complainants shown opposite said groups, on or before May 28, 1931, the amounts set opposite their respective names in said

table, with interest thereon at the rate of six per cent per annum, from the respective dates of payment of the charges assailed shown in the aforesaid agreed statements, as reparation on account of unreasonable rates charged for the transportation of numerous carloads of sugar from California points to destinations in Arizona.

By the commission.

[Seal] GEORGE B. McGINTY,
Secretary.

Index of Abbreviations

AT&SF	The Atchison, Topeka and Santa Fe Railway Company
AE	Arizona Eastern Railroad Company
BT	Bay Transport Company
SP	Southern Pacific Company
SMV	Santa Maria Valley Railroad Company

[40]

[Endorsed]: Filed Sep. 10, 1931. [41]

[Title of Court and Cause—No. L-738-Phx.]

Action brought in said District Court, and the Complaint filed in the office of the Clerk of said District Court, in the City of Phoenix and County of Maricopa.

The President of the United States of America
To Southern Pacific Company, Defendant:

YOU ARE HEREBY DIRECTED TO APPEAR, and answer the Complaint in an action en-

titled as above, brought against you in the District Court of the United States, in and for the District of Arizona, within twenty days after the service on you of this Summons—if served within this County; or within thirty days if served elsewhere.

AND YOU ARE HEREBY NOTIFIED that unless you appear and answer as above required, the said Plaintiff will take judgment for any money or damages demanded in the Complaint, as arising upon contract, or they will apply to the Court for any other relief demanded in the Complaint.

WITNESS: The Honorable F. C. Jacobs, Judge of said District Court, this 7th day of February, in the year of our Lord one thousand nine hundred and thirty and of our Independence the one hundred and fifty-fourth.

[Seal] C. R. McFALL, Clerk.
By Archie L. Gee, Deputy Clerk.

United States Marshal's Office
District of Arizona.

I HEREBY CERTIFY that I received the within writ on the 7th day of February, 1930 and personally served the same on the 8th day of February, 1930, upon Southern Pacific Company, a corporation by delivering to, and leaving with W. C. Heim, Freight Agent for said corporation at Phoenix, Arizona. Said defendant named therein personally, at the ..... County of Maricopa in said District, a certified copy thereof, together with

a copy of the Complaint, certified to by ..... attached thereto.

February 8th, 1930.

G. A. MAUK, U. S. Marshal.
By John Deubler, Deputy.

[Endorsed]: Filed February 10, 1930. [42]

[Title of Court and Cause—No. L-844-Phx.]

Action brought in said District Court, and the Complaint filed in the office of the Clerk of said District Court, in the City of Tucson and County of Pima.

The President of the United States of America
To Southern Pacific Company, a corporation,
Defendant:

YOU ARE HEREBY DIRECTED TO APPEAR, and answer the Complaint in an action entitled as above, brought against you in the District Court of the United States, in and for the District of Arizona, within twenty days after the service on you of this Summons—if served within this County; or within thirty days if served elsewhere.

AND YOU ARE HEREBY NOTIFIED that unless you appear and answer as above required, the said Plaintiff will take judgment for any money or damages demanded in the Complaint, as arising upon contract, or it will apply to the Court for any other relief demanded in the Complaint.

WITNESS: The Honorable ALBERT M. SAMES, Judge of said District Court this 10th day of September, in the year of our Lord one thousand nine hundred and thirty-one and of our Independence the one hundred and fifty-sixth.

[Seal] J. LEE BAKER, Clerk.
By Edward W. Scruggs,
Chief Deputy Clerk.

United States Marshal's Office
District of Arizona.

I HEREBY CERTIFY that I received the within writ on the 10th day of Sept., 1931 and personally served the same on the 11th day of Sept., 1931, upon S. P. Co. by delivering to, and leaving with Vernon L. Clark, Statutory Agent for the S. P. Co. Said defendant named therein personally, at the Phoenix, County of Maricopa in said District, a certified copy thereof, together with a copy of the Complaint, certified to by J. Lee Baker, Clerk U. S. Dist. Court attached thereto.

September 11th, 1931.

G. A. MAUK, U. S. Marshal.
By T. W. Hunt, Office Deputy.

Elliott & Snell.
Heard Building.
Phoenix, Arizona,
Plaintiff's Attorney.

[Endorsed]: Filed Sep. 14, 1931. [43]

[Title of Court and Cause—No. L-738]

MINUTE ENTRY OF MONDAY, SEPTEMBER 26, 1932.

Upon motion of Alexander B. Baker, Esquire of counsel for the defendant, and with the consent of Samuel White, Esquire, of counsel for plaintiffs,

IT IS ORDERED that the defendants be allowed to file an Amended Answer to Plaintiff's Complaint. [44]

[Title of Court and Cause No. L-738-Phx.]

AMENDED ANSWER TO COMPLAINT

Now comes the defendant in the above entitled action and by leave of the Court first had and obtained, files this, its amended answer to the complaint on file therein, wherein and whereby said defendant admits, alleges, and denies as follows:

I.

Admit the allegations of paragraphs I, II, III, and VII of said complaint.

II.

Answering paragraph IV of said complaint, defendant denies that said Interstate Commerce Commission at any time found that said rates of 84 cents, and/or 75 cents per 100 pounds, as referred to in said paragraph, were or was unjust and/or unreasonable, and/or excessive as to said plaintiffs, or in any other respect, either to the extent alleged or to any extent whatsoever, and denies further

that said rates, and/or the freight charges accruing thereunder, or either or any of them, were or was or are or is in fact unjust and/or unreasonable, and/or in violation of the Interstate Commerce Act, or otherwise or in any manner unlawful; but defendant admits that said Commission undertook to find [45] whether said rates had been unreasonable and/or unjust and/or excessive to the extent that they exceeded 77 cents per 100 pounds, upon shipments originating at Crockett, California, and 73 cents per 100 pounds, upon shipments originating at Oxnard, California, and destined to Tucson, Arizona; admits further that said Commission undertook to find that said plaintiffs were entitled to reparation upon their said shipments moving under said rates from and to said points of origin and destination; but defendant alleges that said report and/or findings of said Commission, and each thereof, as to each and all of said shipments of said plaintiffs which had been made and delivered prior to the rendition and issuance of said report and/or findings, were and was and are and is beyond the jurisdiction of said Commission and void, as is hereinafter more particularly set forth.

III.

Answering paragraph V of said complaint, defendant admits that, substantially as alleged in said paragraph, said Commission undertook to require and direct said plaintiffs herein to comply with Rule V of its Rules of Practice; admits further that said plaintiffs undertook to prepare statements

purporting to show, with respect to each of the plaintiffs' said shipments, the information required by said Rule V; admits that said statements were thereafter transmitted to the defendant; but denies that the same were thereafter certified by said defendant; denies further that the copies of said statements which are annexed to and form Exhibit B to the complaint on file herein, are correct, insofar as the same undertake to set forth any liability whatsoever for reparation, on the part of said defendant.

IV.

Answering paragraph VI of said complaint, defendant admits that, substantially as alleged in said paragraph, said Commission undertook to make an order of the character described in said [46] paragraph; but defendant alleges that said purported order was and is in all respects beyond the jurisdiction of said Commission and without statutory authority and void, as is hereinafter more particularly set forth.

V.

Answering paragraph VIII of said complaint, defendant denies that by reason of said alleged unjust and/or unreasonable and/or excessive rates and/or charges, or by reason of the refusal of defendants to pay said reparation, or otherwise, plaintiffs have been damaged, either in the sum of $726.28, or any other sum or amount mentioned in said complaint, either with interest or otherwise; or

that said plaintiffs have otherwise been damaged, in any other or different sum or sums whatsoever.

VI.

Answering paragraph IX of said complaint, defendant denies that the sum of $300.00 or any other sum whatsoever, is or would be a reasonable attorney's fee to be allowed in this action.

VII.

Defendant further shows and alleges that said purported order of said Interstate Commerce Commission, referred to in paragraph VI of said complaint, insofar as it authorizes, directs and/or commands the payment of reparation upon the plaintiffs' said shipments, was and is beyond the power and jurisdiction of said commission, and without any statutory warrant or authority whatsoever; and in this behalf defendant alleges that the rates which were charged and collected upon plaintiffs' said shipments, as set forth in said complaint, had previously been formally approved, and declared to be reasonable, by said Commission, and/or were less in amount than rates which had been specifically approved and declared by said Commission to be reasonable, after formal investigation; and that said approved rates remained in full force and effect, subject only, in certain instances, to changes [47] ordered, directed and/or approved by the Director-General of Railroads and/or said Commission itself, during all times mentioned in the complaint before the Commission and in the complaint on file herein; that said rates were applied upon plaintiffs' said

shipments, and were charged and collected, pursuant to the authority and approval of said Commission; and that each and all of said rates, and/or the charges thereunder accruing upon plaintiffs' said shipments, was and were and is and are just, and reasonable, and in full conformity with all of the requirements of the Interstate Commerce Act.

WHEREFORE, defendant prays:

(1) That the Court order judgment to be entered, against said plaintiffs, and in favor of defendant, dismissing said complaint;

(2) That defendant be allowed its costs herein incurred;

(3) For such other, further and different relief as may be proper in the premises.

Dated September 23, 1932.

BAKER & WHITNEY,
Attorneys for Defendant.

JAMES E. LYONS,
BURTON MASON,
Of Counsel. [48]

State of California,
City and County of San Francisco.—ss.

G. L. KING, being first duly sworn, deposes and says:

That he is Assistant Secretary of Southern Pacific Company, a corporation, the defendant in the above entitled proceeding, and makes this verification for and on behalf of said defendant; that he has read the foregoing amended answer and knows the contents thereof, and the same is true of his own

knowledge, except as to the matters which are therein stated on information and belief, and as to those matters, he believes the same to be true.

G. L. KING.

Subscribed and sworn to before me this 23d day of September, 1932.

[Seal] FRANK HARVEY,
Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Sept. 26, 1932. [49]

[Title of Court and Cause No. L-844-Phx.]

DEFENDANTS' ANSWER TO COMPLAINT.

The defendants in the above-entitled cause, for their joint and several answer to the complaint of the plaintiff on file therein, admit, allege and deny as follows:

I.

Admit the allegations of paragraphs I, II, III, V, and VIII of said complaint.

II.

Answering paragraph IV of said complaint, defendants admit that freight charges were assessed upon the several shipments of the plaintiff referred to in said paragraph IV, and in said Exhibit A, annexed to said complaint, in the amounts and at the legal tariff rates set forth therein; admit further that said shipments were made upon through

bills of lading from said points of origin in California to said destination point, Tucson, Arizona; but defendants deny that said rates, and/or freight charges, accruing thereunder, or either or any of them, were or was or are or is unreasonable, either as to the plaintiff or otherwise, and/or in violation of the Interstate Commerce Act, or otherwise or in any manner unlawful; deny further that the just and/or reasonable freight rate which should have been charged upon any or all of said shipments, from any or all of said points of origin to said [50] destination, was or should have been 73 cents per 100 pounds, upon shipments from Oxnard and/or Betteravia, California, and/or 77 cents per 100 pounds, upon shipments from Crockett and San Francisco, California, as alleged in said complaint, or any other sum or amount less than the duly published rates actually and legally applied thereon, as hereinbefore set forth.

III.

Answering paragraph VI of said complaint, defendants deny that said Interstate Commerce Commission at any time found that said rates, or either or any of them, were or was unreasonable, as to the plaintiff or otherwise, either to the extent alleged or to any extent whatsoever; but defendants admit that, substantially as alleged in said paragraph, said Interstate Commerce Commission undertook to find whether said rates had been unreasonable to the extent they, or either of them, exceeded 73 cents per 100 pounds, upon shipments originating at Oxnard

and Betteravia, California, and 77 cents per 100 pounds, upon shipments originating at Crockett and San Francisco, California, and moving to Tucson, Arizona; but defendants allege that said finding and/or findings of said Commission, and each of them, as to each and all of plaintiff's shipments which had been made and delivered prior to the rendition and issuance thereof, was and were beyond the jurisdiction of said Commission, and void and of no effect whatsoever, as is hereinafter more particularly set forth.

IV.

Answering paragraph VII of said complaint, defendants admit that, substantially as alleged in said paragraph, the Interstate Commerce Commission undertook to make an order of the character set forth in said paragraph VII; but defendants allege that said order was and is altogether void and unenforceable, for the reason that said Commission is wholly without jurisdiction in the premises, as is hereinafter more particularly set forth. [51]

V.

Answering paragraph IX of said complaint, defendants deny that by reason of said alleged unreasonable rates and/or charges, and/or the payment thereof by the plaintiff, and/or by reason of the refusal of the defendants to pay said reparation, or otherwise, plaintiff has been damaged either in the sum of $1171.69, or any sum mentioned in said complaint, either with or without interest, or that

plaintiff has otherwise been damaged in any other sum or amount whatsoever.

VI.

Answering paragraph X of said complaint, defendants deny that the sum of $750.00, or any other sum whatsoever, is or would be a reasonable attorney's fee to be allowed to the plaintiff by the court herein.

VII.

Defendants further show and allege that said purported order of said Interstate Commerce Commission, referred to in paragraph VII of said complaint, insofar as it authorizes, directs or commands the payment of reparation upon plaintiff's said shipments, was and is beyond the power and jurisdiction of said Commission, and without any statutory warrant or authority whatsoever, for the reason that the rates which were applied and assessed upon plaintiff's said shipments, had previously been established and/or approved, and declared to be reasonable, by said Commission itself, pursuant to formal investigation, and/or were less in amount than rates which had thus been approved and/or declared to be reasonable by said Commission; that said rates, as thus approved and/or declared reasonable, remained in effect, subject only to changes ordered, directed, and/or approved by the Director-General of Railroads, and/or said Commission itself, and to certain voluntary reductions made by said defendants, during all the times mentioned in said complaint on file herein; and that said rates

[52] were applied and assessed upon plaintiff's said shipments pursuant to the authority and approval of said Commission.

WHEREFORE, defendants respectfully pray the court to order judgment entered against said plaintiff, and in favor of said defendants, dismissing said complaint; that defendants have their costs of suit herein incurred; and that the court grant such other and further relief as may be meet and proper in the premises.

DATED: May 20th, 1932.

BAKER & WHITNEY
Attorneys for Defendants.

JAMES E. LYONS
BURTON MASON
Of Counsel. [53]

State of California,
City and County of San Francisco—ss.

G. L. KING, being first duly sworn, deposes and says:

That he is Assistant Secretary of Southern Pacific Company, a corporation, one of the defendants in the above entitled proceeding, and makes this verification for and on behalf of said defendants; that he has read the foregoing answer and knows the contents thereof, and the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters, he believes the same to be true.

G. L. KING.

Subscribed and sworn to before me this 20th day of May, 1932.

[Seal] FRANK HARVEY,
Notary Public.
In and for the City and County of San Francisco, State of California.

Receipt of copy of the within and foregoing Answer to Complaint is acknowledged this 24th day of May, 1932.

ELLIOTT & SNELL.

[Endorsed]: Filed May 24, 1932. [54]

[Title of Court and Cause—No. L-738-Phx.]

WAIVER OF JURY TRIAL.

IT IS HEREBY STIPULATED AND AGREED, by and between the parties to this cause that a jury trial shall be waived, and that the case shall be tried before a judge of this court without the aid or intervention of a jury.

Dated this 26th day of September, 1932.

SAMUEL WHITE,
Attorney for Plaintiffs.
BAKER & WHITNEY,
Attorneys for Defendant.

[Endorsed]: Filed Sep. 26, 1932. [55]

[Title of Court and Cause—No. L-844-Phx.]

WAIVER OF JURY.

Comes now the above named plaintiff and defendants by their respective attorneys, and waive a jury in the above entitled cause.

Dated this 22nd day of September, 1932.

ELLIOTT & SNELL,
Attorneys for Plaintiff.
BAKER & WHITNEY,
Attorneys for Defendants.

[Endorsed]: Filed Sep. 23, 1932. [56]

[Title of Court and Cause—No. L-738-Phx.]

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Now comes the plaintiffs above-named, by its attorney, Samuel White, and hereby requests the court to make the following findings of fact and conclusions of law in this action.

Dated this 1st day of February, 1933.

SAMUEL WHITE,
Attorney for Plaintiffs. [57]

[Title of Court and Cause—No. L-738-Phx.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause coming on for trial at the regular term of said court, and on the 11th day of October, 1932, and having been tried before the court, a jury having been legally waived by the respective parties hereto, plaintiffs apparing by their attorney, Samuel White, and the defendant appearing by its attorneys, Baker and Whitney, Chalmers, Fennemore and Nairn, James E. Lyons, Burton Mason and Gerald E. Duffy; and the parties hereto having agreed and stipulated that this cause would be consolidated for purposes of trial with certain other causes pending in this court, and being numbered and docketed as follows, to-wit: L-844 Phoenix; and said parties having further stipulated and agreed that the evidence introduced in said causes so consolidated for purposes of trial would apply to each of said cases so consolidated; and the respective parties herein having offered both oral and documentary evidence in support of their respective pleadings herein, and the trial of said matters having been concluded on the 13th day of October, 1932, and the court, pursuant to stipulation of the [58] parties, on the 17th day of January, 1933, having heard oral testimony offered by the respective parties hereto as to the matter of attorney's fees to be allowed plaintiff's attorney; and the court having been duly requested by the parties hereto to make,

enter and file special findings of fact and conclusions of law in said causes prior to rendering judgment; and the court having considered said evidence and said argument of counsel, and being fully advised in the premises, does hereby make and find the following as its findings of fact and conclusions of law, constituting the decision of the court in this action.

FINDINGS OF FACT.

I.

That plaintiffs are, and at all times hereinafter mentioned were, co-partners doing business in the State of Arizona under the firm name of Baffert and Leon.

II.

That at all times mentioned in plaintiffs' complaint the defendant, Southern Pacific Company, a corporation, was, and now is, a railroad corporation, engaged in the operation of railroad lines for transportation of freight in interstate commerce, and

III.

That between the 17th day of February, 1925, and the 10th day of September, 1925, inclusive, there was shipped by the plaintiffs, F. J. Baffert and A. S. Leon, over the lines of the defendant, Southern Pacific Company, 18 carload shipments of sugar; that said shipments originated at Crockett and Oxnard, in the State of California, and were destined to the plaintiffs at Tucson, in the State of Arizona; that said shipments are severally and collectively set forth in plaintiffs' Exhibit "B" [59] attached

to plaintiffs' complaint filed herein, to which reference is hereby made the same as if said exhibit, and the contents thereof, were a part of these findings of fact, and which exhibit correctly shows in detail the points of origin and the point of destination; the dates upon which said shipments were made; the dates upon which the charges for transportation thereof were paid; the car initials and numbers in which said shipments were loaded and transported; the weights of said shipments; the rates charged and the amount collected thereon; the rates and amounts subsequently found by the Interstate Commerce Commission to be reasonable and which should have been charged, and the difference between the rates charged and the rates which said commission found should have been charged, said last mentioned amounts being the amount of reparation claimed by the plaintiff and allowed by said commission, with respect to each of said shipments.

IV.

That the defendant, Southern Pacific Company, charged plaintiffs, F. J. Baffert and A. S. Leon, and said plaintiffs were compelled to, and did, pay to said defendant on all said shipments from said points of origin in California to said point of destination in Arizona, between said dates, freight charges in the sum of 84 cents and 75 cents per hundred pounds; that all of said shipments were made on true bills-of-lading from said points of origin to said point of destination.

V.

That the plaintiff, prior to the commencement of this action, filed its petition and complaint with and before the Interstate Commerce Commission of the United States, alleging that the rates and charges on the above mentioned shipments [60] were unjust and unreasonable as to the plaintiff, and that thereafter the defendant filed its answer with and before said commission, said matter being docketed before said commission under Docket No. 17549 (Sub-No. 1).

VI.

That said Interstate Commerce Commission issued and filed its findings of fact in said matter on the 12th day of March, 1928, which findings are reported in Vol. 140 I. C. C. Page 171; that said commission found that said rates of 84¢ and 75¢ per hundred pounds charged and collected by said defendant on said shipments from said points of origin to said point of destination was unreasonable as to the plaintiffs to the extent that they exceeded a rate and charge of 77¢ and 73¢ per hundred pounds from and after July 1, 1922, up to and including the 10th day of September, 1925; that said commission further found in said findings that the plaintiff had been damaged in the amount of the difference between the said rates paid by plaintiffs and the rate found by said commission in said proceedings to have been reasonable, and that plaintiffs were entitled to reparation therefor on all said shipments, with interest thereon.

VII.

That the plaintiffs have duly complied with all the requirements of said Interstate Commerce Commission as to the proof necessary for the amount of said reparation.

VIII.

That on the 7th day of September, 1929, said Interstate Commerce Commission, in Docket No. 16742 and causes consolidated therewith, including said Docket No. 17549 (Sub-No. 1) duly made and published its order, directing and requiring the defendant herein to pay to the plaintiffs herein the [61] sum of Seven Hundred Twenty-six and 28/100 ($726.28) Dollars, together with interest thereon at the rate of six per cent per annum from the respective dates of payment of the charges collected by the defendant from plaintiffs, said sum to be paid on or before the 22nd day of October, 1929; said sum being the amount of reparation on account of said unreasonable rates charged and collected by said defendant for transportation of said 18 carload shipments of sugar.

IX.

That the defendant failed and refused to comply with said order to pay said reparation, or any part thereof, though request was made by the plaintiffs upon said defendant for payment of same.

X.

That said freight rates charged and collected, as aforesaid, were unjust, unreasonable and excessive

as to said plaintiffs, and in violation of the Interstate Commerce Act of February 4, 1885, and Acts of Congress amendatory thereof.

XI.

That the just and reasonable freight rate which should have been charged on all said 18 carload shipments from said Crockett and Oxnard, in the State of California, to said Tucson, Arizona, from and after July 1, 1922, and up to and including the 10th day of September, 1925, was 77 cents per hundred pounds.

XII.

That by reason of the said unreasonable rates and charges, and the payment thereof by plaintiffs, and by reason of the refusal of the defendants to pay said reparation in pursuance of said order made by said commission, plaintiffs have been damaged by said defendant in the sum of $726.28 [62] together with interest thereon at the rate of six per cent per annum from the respective dates of payment, as shown on Exhibit "B", attached to plaintiffs' complaint, down to and including the 22nd day of October, 1929, amounting to the sum of $191.95, together with interest at the rate of six per cent per annum on the total sum of principal and interest, to-wit: $918.23, from said 22nd day of October, 1929, until paid.

XIII.

That plaintiff herein has been compelled to employ an attorney-at-law to prosecute the present

action to collect said reparation so awarded by said commission, and that 20% of the total amount found due, including principal and interest, is a reasonable sum to be allowed as attorney's fees.

CONCLUSIONS OF LAW.

I.

That said order of the Interstate Commerce Commission dated September 7, 1929, made and entered in that certain proceeding before said commission, entitled Traffic Bureau of Phoenix Chamber of Commerce, et al, vs. Atchison, Topeka & Santa Fe Railway Company, et al, Docket No. 16742, and causes consolidated therewith, including Docket No. 17549 (Sub-No. 1) which said order required said defendant to pay to the plaintiffs herein certain sums of money as set forth in said order and in plaintiffs' complaint, was, and is, a legal, valid and binding order and was made and entered by said Interstate Commerce Commission in said cause, and was within the power and jurisdiction conferred on said Interstate Commerce Commission in said cause by law, and that in the making of said order said commission acted within its jurisdiction and power. [63]

II.

That the rates of 84¢ and 75¢ per hundred pounds charged the plaintiffs by the defendant from Crockett and Oxnard, California, to Tucson, Arizona, between the February 17, 1925, and September 10, 1925, inclusive, on said 18 carload shipments of

sugar, as shown on Exhibit "B", attached to plaintiffs' complaint, was found by the Interstate Commerce Commission, in said proceedings, Docket No. 16742, and causes consolidated therewith, including Docket No. 17549 (Sub. No. 1) unreasonable to the extent that said rates exceeded 77¢ from northern California points, originating at Crockett, and a rate of 73¢ from southern California point, originating at Oxnard to said point of destination at Tucson, Arizona, and that the reasonable rates which should have been charged the plaintiffs on account of said shipments over defendant's lines, during said period, was 77¢ from Crockett, California and 73¢ from Oxnard, California, per hundred pounds to said point of destination at Tucson, Arizona.

III.

That by reason of said unreasonable charges the plaintiffs have been damaged and the defendant, Southern Pacific Company, is indebted to the plaintiffs in the sum of $726.28, together with interest thereon at the rate of six per cent per annum from the respective dates of payment of said charges, as shown on said exhibit "B", attached to plaintiffs' complaint down to and including the 22nd day of October, 1929, amounting to the sum of $191.95, and interest on said total sum of principal and interest, to-wit: $918.23, from said 22nd day of October, 1929, until paid; said principal and interest amounting to the sum of $....., as of this date, and the further [64] sum of 20% of the total amount of said

indebtedness, including principal and interest, as and for attorney's fees, amounting to the sum of $....., and said defendant became and is indebted to the plaintiffs in said total sum of principal and interest, and attorney's fees of $..... together with plaintiffs' costs and disbursements herein expended, and that plaintiffs are entitled to judgment therefor.

Dated this ..... day of February, 1933.

.....

Judge.

Received Copy of the Within documents this 1st day of February, 1933.

BAKER & WHITNEY and
LAWRENCE L. HOWE,
Attorney for .....

[Endorsed]: Filed Feb. 1, 1933. [65]

[Title of Court and Cause—No. L-844-Phx.]

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Now comes the plaintiff above mentioned, by its attorneys Elliott and Snell, and hereby requests the court to make the following Findings of Fact and Conclusions of Law in this action.

Dated this 31st day of January, 1933.

ELLIOTT and SNELL,
Attorneys for Plaintiff. [66]

[Title of Court and Cause No. L-844-Phx.]

This cause coming on for trial at the regular term of said court and on the 11th day of October, 1932, and having been tried before the court, a jury having been legally waived by the respective parties hereto, plaintiff appearing by its attorneys Elliott and Snell, and the defendants appearing by their attorneys Baker and Whitney, Chalmers, Fennemore and Nairn, James E. Lyons and Burton Mason; and the parties hereto having agreed and stipulated that this cause would be consolidated for purposes of trial with another cause pending in this court, and being numbered and docketed as follows, to-wit, No. L-738-Phoenix; and said parties having further stipulated and agreed that the evidence introduced in said causes so consolidated for purposes of trial would apply to each of said two respective cases so consolidated; and the respective parties having offered both oral and documentary evidence in support of their respective pleadings herein, and the trial of said matter having been concluded on the 13th day of October, 1932; and pursuant to stipulation the parties subsequently on the 17th day of January, 1933, offered certain oral testimony with respect to the matter of the fees to be allowed to plaintiff's attorneys and counsel; and the court being duly requested to make, enter and file special Findings of Fact and Conclusions of Law in said cause prior to rendering judgment; and the court, after hearing the evidence, the argument of counsel, and being fully advised in the premises, does hereby make and file the following

as its Findings of Fact and Conclusions of Law, constituting the decision of the court in this action:

FINDINGS OF FACT.

That plaintiff is, and was at all times herein mentioned, a corporation organized under the laws of the State of Arizona, and qualified to do business [67] in said State of Arizona.

II.

That defendants, Southern Pacific Company, and Santa Maria Valley Railroad Company, now are, and at all times herein mentioned have been, corporations duly organized and existing as such, and engaged in the operations of lines of railroad, pursuant to the authority of law, as common carriers for hire, and in the transportation of property by means of their lines of railroad and in conjunction with their connecting carriers, in interstate commerce from points in the State of California to points in the State of Arizona.

III.

That heretofore, and at various dates between the 14th day of September, 1923, and the 1st day of May, 1928, there were shipped to Tucson from Betteravia, Oxnard, Crockett, and San Francisco, California, over the lines of said defendants, 23 carload shipments of sugar; that said shipments are severally and correctly set forth upon the list shown as "Exhibit A" attached to plaintiff's complaint filed herein, to which reference is hereby made the same as if said exhibit and the contents thereof

were a part of these Findings of Fact; and which list correctly shows in detail the dates upon which the charges for transportation thereof were collected, the car initials and numbers of the cars in which the same were loaded and transported, the several points of origin thereof, the several weights of said shipments, the rates thereon assessed, and the charges thereon collected, the rates subsequently found by the Interstate Commerce Commission to have been reasonable, and the amounts which would have accrued under said last-mentioned rates (said last-mentioned rates and amounts being shown under the columns headed "Should be"), and the amount of reparations claimed by the plaintiff and allowed by said Commission with respect to each of said shipments.

IV.

That the plaintiff, prior to the commencement of this action, filed his petition and complaint with and before the Interstate Commerce Commission of [68] the United States, alleging that the rates and charges on the abovementioned shipments were unjust and unreasonable as to the plaintiff, and that thereafter the defendants filed their answer with and before the Interstate Commerce Commission under docket No. 16770 (subdivision No. 2).

V.

That the Interstate Commerce Commission on March 12, 1928, made and rendered its opinion and order reported in volume 140 of Interstate Commerce Commission Reports, at page 171 and follow-

ing, and finding that the rates on sugar in carloads from Betteravia and Oxnard, California, had in the past been unreasonable to the extent that they exceeded a rate and charge of 73¢ per 100 pounds on and after July 1, 1922, and from Crockett and San Francisco, California, had in the past been unreasonable to the extent that they exceeded a rate and charge of 77¢ per 100 pounds on and after July 1, 1922, and that certain of the plaintiffs in said proceedings, (including plaintiff herein) had made shipments at the rates found in said proceedings to have been unreasonable; that they had paid and borne the charges thereon, and were damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the rates found in said proceedings to have been reasonable; and that said complainants (including plaintiff herein) were entitled to reparation, with interest. Said list of shipments set forth in plaintiff's "Exhibit A" attached to its complaint hereinabove referred to shows in detail, as previously stated, the charges actually assessed upon plaintiff's shipments involved in this cause, and the charges which would have accrued thereon upon the basis of the rates declared by said Commission in said above-mentioned report and order to have been the reasonable rates to have been applied at said dates of movement, together with the difference between the charges so assessed and those which would have accrued, which said last mentioned differences constitute the amounts herein claimed by the plaintiff, exclusive of interest and fees of its attorneys and counsel.

VI.

That said freight charges assessed the plaintiff on the list of shipments [69] set forth in said "Exhibit A" hereinabove referred to, same being the shipments involved in this cause, were and are unreasonable to the plaintiff and in violation of the Interstate Commerce Commission Act of February 4, 1887, and the acts of Congress amendatory thereto.

VII.

That the just and reasonable rates which should have been charged on all of said shipments listed in said "Exhibit A" above referred to from Betteravia and Oxnard, California, to said point of destination in Arizona after the 1st day of July, 1922, was 73¢ per 100 pounds, and from Crockett and San Francisco, California, to said point of destination in Arizona after the 1st day of July, 1922, was 77¢ per 100 pounds.

VIII.

That the plaintiff did duly comply with all of the requirements of the Interstate Commerce Commission as to the proof necessary for the amount of said reparations.

IX.

That heretofore and on the 13th day of April, 1931, the Interstate Commerce Commission duly made and rendered its Supplemental Order in Docket No. 16742 and causes consolidated therewith, including said Docket No. 16770 (subdivision No. 2), ordering and directing the defendants to pay unto the plaintiff the following sums, to-wit:

Santa Maria Valley Railroad Company	$ 81.60
Southern Pacific Company	$1090.09
	$1171.69

together with interest thereon at the rate of six percent (6%) per annum from the respective dates of the payment of the charges as shown on said list of shipments above referred to and specifically set forth on "Exhibit A" attached to plaintiff's complaint filed in this cause.

Said last mentioned Order required the payment of said sums on or before the 28th day of May, 1931; and that the same were as reparation on account of the unreasonable rates charged for the transportation of certain carload [70] shipments of sugar from points in California to points in Arizona (including Tucson, Arizona).

Defendants have failed and refused to comply with said Order, or to pay said sums or any part thereof to the plaintiff although demand and request therefor have heretofore been duly made by the plaintiff upon said defendants.

X.

That by reason of said unreasonable rates, charges, and payment thereof by the plaintiff, and by reason of the refusal of the defendants to pay said reparations so awarded by the Interstate Commerce Commission, plaintiff is damaged by the defendant Santa Maria Valley Railroad Company in the total sum of $81.60, and by the defendant Southern Pacific Company in the total sum of $1090.09,

together with interest on said amounts at the rate of six percent (6%) per annum from the respective dates of payment.

XI.

That the plaintiff was required to employ attorneys at law to prosecute the present action, in order to effect collection of said reparations, and that twenty percent (20%) of the total amount due, including interest and principal, in this cause is reasonable as attorneys fees.

CONCLUSIONS OF LAW.

Based upon the foregoing Findings of Fact, the Court finds as Conclusions of Law as follows:

I.

That the order of the Interstate Commerce Commission dated the 13th day of April, 1931, and made and entered in that certain proceeding before said Commission entitled "Traffic Bureau of Phoenix Chamber of Commerce, et al, v. Atchison, Topeka & Santa Fe Railway Company, et al", docketed No. 16742, and causes consolidated therewith (including Docket No. 16770), which said order required said defendants to pay to the plaintiff herein certain sums of money as set forth in said Order, and in plaintiff's complaint, was and is a legal, valid and binding order, and was made and entered by said Interstate Commerce [71] Commission in said cause, and was within the power and jurisdiction conferred upon said Interstate Commerce Commission by law, and that in the making of said

Order the said Interstate Commerce Commission acted within its jurisdiction and power.

II.

That the following rates charged the plaintiff by the defendants, to-wit:

For a shipment made on September 14, 1923 from Betteravia, California, 86½¢ per 100 pounds;

For a shipment made on October 13, 1923, as shown on "Exhibit A" attached hereto and made a part hereof, 86½¢ per 100 pounds;

For a shipment made on April 28, 1928, as shown on "Exhibit A" attached hereto and made a part hereof, 75¢ per 100 pounds;

For shipments made between February 27, 1923, and December 28, 1923, inclusive, from Crockett and San Francisco, California, 86½¢ per 100 pounds;

For shipments made between January 24, 1924, and July 13, 1925, inclusive, from Crockett and San Francisco, California, 84¢ per 100 pounds;

on carload shipments of sugar, all as shown on "Exhibit A" attached to plaintiff's complaint, were, as found by the Interstate Commerce Commission in said proceedings known as Docket No. 16742, unreasonable to the extent that they exceeded 73¢ per 100 pounds from Betteravia and Oxnard, California, and 77¢ per 100 pounds from Crockett and San Francisco, California, to Tucson, Arizona, during the periods hereinabove set forth; and that the reasonable rates which should have been charged the plaintiff on account of said shipments over defendants' lines during said periods were 73¢ cents per

100 pounds from Betteravia and Oxnard, California, and 77¢ per 100 pounds from Crockett and San Francisco, Calif., to Tucson, Arizona. [72]

That by reason of said unreasonable charges the plaintiff has been damaged, and the defendant Santa Maria Valley Railroad Company is indebted to the plaintiff in the sum of $81.60 principal, together with interest at the rate of six percent (6%) per annum from the respective dates of payment of the charges as shown on the list of shipments set forth in "Exhibit A" attached to plaintiff's complaint, said interest amounting to the sum of $..... as of this date, and attorneys fees of twenty percent (20%) of the total amount of said indebtedness, including principal and interest, said attorneys fees amounting to the sum of $.....; and the defendant Southern Pacific Company is indebted to the plaintiff in the sum of $1090.09, together with interest at the rate of six percent (6%) per annum from the respective dates of payment of the charges as shown on the list of shipments set forth in "Exhibit A" attached to plaintiff's complaint, said interest amounting to the sum of $..... as of this date, and attorneys fees of twenty percent (20%) of the total amount of said indebtedness, including principal and interest, said attorneys fees amounting to the sum of $.....; and that the plaintiff is entitled to judgment therefor.

Dated this.....day of....., 1933.

.....

Judge of the District Court.

Received copy of within this 1st day of February 1933.

BAKER & WHITNEY
LAWRENCE L. HOWE
Attys. for Sou. Pac. Co.

[Endorsed]: Filed Feb. 1, 1933. [73]

MINUTE ENTRY OF THURSDAY, FEBRUARY 2, 1933.

[Title of Court and Cause—Consolidated Cases]

Upon motion of Alexander B. Baker, Esquire, of counsel for the Defendants,

IT IS ORDERED that the defendants be allowed twenty (20) days from and after this date, within which to file Proposed Amendments and Additions to Plaintiffs' Findings of Fact and Conclusions of Law. [74]

[Title of Court and Cause—Consolidated Cases]

DEFENDANTS' PROPOSED AMENDMENTS AND ADDITIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW REQUESTED BY PLAINTIFFS.

The defendants in the above-named causes hereby propose amendments and additions to the findings of fact and conclusions of law requested by the plaintiffs in said causes, as follows:

1. The defendants propose that plaintiffs' said requested findings of fact and conclusions of law in said causes be amended by eliminating the several preambles thereto, for the reason that the same are not, nor is either of them, in accordance with the record and the law, nor sufficiently clear, definite and concise; and defendants request that the preamble to the special findings of fact and conclusions of law requested by the defendants, annexed hereto, be substituted therefor.

2. Defendants propose that plaintiffs' said findings be amended by eliminating the paragraphs numbered I of plaintiffs' said requested findings of fact in each of said causes, for the reason [75] that the findings therein set forth should be consolidated into one paragraph, said causes having been duly consolidated for purposes of trial and decision, pursuant to stipulation of the parties and order of court; and defendants therefore request that paragraph 1 of the special findings of fact requested by defendants, annexed hereto, be substituted therefor.

3. Defendants propose that plaintiffs' said findings be amended by eliminating paragraph II of plaintiffs' requested findings of fact in Cause No. L-738, for the reason that said paragraph is superfluous, in that the above-entitled causes have been duly consolidated for purposes of trial and decision, and said paragraph should therefore be merged into a single paragraph relating to all of the defendants in both of the causes; and defendants therefore request that paragraph 2 of the special

findings of fact requested by defendants, annexed hereto, be substituted therefor.

4. Defendants propose that plaintiffs' said findings be amended by eliminating the paragraphs numbered III of plaintiffs' requested findings of fact in each of said causes, for the reason that the same are not sustained by the evidence, and are contrary to the evidence and the record, and for the further reason that the same are not sufficiently clear, definite and concise; and defendants request that paragraph 3 of the special findings of fact requested by defendants, annexed hereto, be substituted therefor.

5. Defendants propose that plaintiffs' said findings be amended by eliminating paragraph IV of the special findings of fact requested by plaintiffs in Cause No. L-738, for the reason that the same is not sustained by the evidence and the law, and is contrary to the evidence and the law, and upon the further ground that the same is not sufficiently clear and definite.

6. Defendants propose that plaintiffs' said findings be amended by eliminating paragraph V of plaintiffs' requested findings of fact in Cause No. L-738, and paragraph IV of plaintiff's requested [76] findings of fact in Cause No. L-844, for the reason that the same are not sustained by the evidence, and are contrary to the evidence and the record herein, and for the further reason that the same are not sufficiently clear, definite and concise; and defendants request that paragraph 4 of the spe-

cial findings of fact requested by defendants, annexed hereto, be substituted therefor.

7. Defendants propose that plaintiffs' said findings be amended by eliminating paragraph VI of plaintiffs' requested findings of fact in Cause No. L-738, and paragraph V of plaintiff's requested findings of fact in Cause No. L-844, for the reason that the same are not sustained by the evidence, and are contrary to the evidence and the law, and for the further reason that the same are not sufficiently clear and definite; and defendants request that paragraph 5 of the special findings of fact requested by defendants, annexed hereto, be substituted therefor.

8. Defendants propose that plaintiffs' said findings be amended by eliminating paragraph VII of plaintiffs' requested findings of fact in Cause No. L-738, and paragraph VIII of plaintiff's requested findings of fact in Cause No. L-844, for the reason that the same are not sufficiently clear and definite, and are not sustained or supported by the evidence, and are contrary to the evidence and the law; and defendants request that paragraph 6 of the special findings of fact requested by defendants, annexed hereto, be substituted therefor.

9. Defendants propose that plaintiffs' said findings be amended by eliminating paragraphs VIII and IX (on sheets 4 and 5) of plaintiffs' requested findings of fact in Cause No. L-738, and paragraph IX of plaintiff's requested findings of fact in Cause No. L-844, for the reason that the same are not sustained or supported by the evidence, and are con-

trary to the evidence and the law, and for the further reason that the same are not sufficiently clear, definite and concise; and defendants request that para- [77] graphs 7 and 8 of the special findings of fact requested by defendants, annexed hereto, be substituted therefor.

10. Defendants propose that plaintiffs' said findings be amended by eliminating paragraphs X and XI of plaintiffs' requested findings of fact in Cause No. L-738, and paragraphs VI and VII of plaintiff's requested findings of fact in Cause No. L-844, for the reason that the same are not sustained or supported by the record or the evidence, and are contrary to the evidence and the law; and defendants request that paragraph 16 of the special findings of fact requested by defendants, annexed hereto, be substituted therefor.

11. Defendants propose that plaintiffs' said findings be amended by eliminating paragraph XII of plaintiffs' requested findings of fact in Cause No. L-738, and paragraph X of plaintiff's requested findings of fact in Cause No. L-844, for the reason that the same are not sustained or supported by the record or the evidence, and are contrary to the evidence and the law.

12. Defendants propose that plaintiffs' said findings be amended by eliminating the paragraph numbered VIII on sheet 6 of plaintiffs' requested findings of fact in Cause No. L-738, and paragraph XI of plaintiff's requested findings of fact in Cause No. L-844, for the reason that the same are not sustained

by the evidence, and are contrary to the evidence and the law, and upon the further ground that the same are not sufficiently clear, definite and concise.

13. Defendants propose, as further additions and amendments to the findings of fact requested by plaintiffs, that the Court make findings of fact as set forth in paragraphs 9, 10, 11, 12, 13, 14 and 15 of the findings of fact requested by defendants, hereto annexed.

14. Defendants propose that plaintiffs' conclusions of law be amended by eliminating the paragraphs numbered I of the conclu- [78] sions of law requested by plaintiffs in each of said causes, for the reason that the same are not sustained by the evidence or the law, and are contrary to the evidence and the law; and defendants request that paragraph 2 of the conclusions of law requested by defendants, annexed hereto, be substituted therefor.

15. Defendants propose that plaintiffs' conclusions of law be amended by eliminating the paragraphs numbered II of the conclusions of law requested by plaintiffs in each of said causes, for the reason that the same are not sufficiently clear and definite, and are not sustained by the evidence or the law, and are contrary to the evidence and the law; and defendants request that paragraph 1 of the conclusions of law requested by defendants, annexed hereto, be substituted therefor.

16. Defendants propose that plaintiffs' conclusions of law be amended by eliminating the paragraphs numbered III of the conclusions of law re-

quested by plaintiffs in each of said causes, for the reason that the same are not sustained by the evidence or the law, and are contrary to the evidence and the law, and for the further reason that the same are not sufficiently clear, definite and concise; and defendants request that paragraphs 3 and 4 of the conclusions of law requested by defendants, annexed hereto, be substituted therefor.

WHEREFORE, defendants pray that the findings of fact and conclusions of law requested by plaintiffs be amended as hereinbefore specified, and that the Court make additional findings of fact and conclusions of law as set forth in the document styled "Special Findings of Fact and Conclusions of Law Requested by Defendants", which is annexed hereto, and herewith filed and presented to the Court; and that in accordance therewith the Court do render and enter judgments in the above causes, in favor of [79] the defendants, and against the plaintiffs.

Dated: February 21, 1933.

CHALMERS, FENNEMORE & NAIRN,
BAKER & WHITNEY,
GERALD E. DUFFY,
JAMES E. LYONS,
BURTON MASON,
Attorneys for Defendants.

Received copy of within this 21st day of Feb. 1933.

SAMUEL WHITE,
Atty. for Pltf.

[Endorsed]: Filed Feb 21 1933. [80]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF SATURDAY, APRIL 15, 1933.

Messrs. Elliott & Snell, by Frank L. Snell, Jr., Esquire, and Samuel White, Esquire, appear as counsel for plaintiffs. Messrs. Baker & Whitney, by Alexander B. Baker, Esquire, appear as counsel for the defendants.

Upon motion of counsel for plaintiffs.

IT IS ORDERED that Findings of Fact and Conclusions of Law, be set for hearing and settlement, Friday, May 12, 1933, at the hour of ten o'clock A. M. [94]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF FRIDAY, MAY 12, 1933.

Findings of Fact and Conclusions of Law requested by plaintiffs; Defendants' Proposed Amendments and Additions thereto and Special Findings of Fact and Conclusions of Law Requested by Defendants come on regularly for hearing this day.

Messrs. Elliott & Snell, by Frank L. Snell, Jr., Esquire, and Messrs. White & Wilson, by Samuel White, Esquire, appear for Plaintiffs. Messrs. Chalmers, Fennemore & Nairn, by T. G. Nairn, Esquire, Gerald Duffy, Esquire, and Burton Mason, Esquire, appear for the Defendants.

Argument is had by respective counsel, and

IT IS ORDERED that Findings of Fact and Conclusions of Law shall be consolidated when it

quested by plaintiffs in each of said causes, for the reason that the same are not sustained by the evidence or the law, and are contrary to the evidence and the law, and for the further reason that the same are not sufficiently clear, definite and concise; and defendants request that paragraphs 3 and 4 of the conclusions of law requested by defendants, annexed hereto, be substituted therefor.

WHEREFORE, defendants pray that the findings of fact and conclusions of law requested by plaintiffs be amended as hereinbefore specified, and that the Court make additional findings of fact and conclusions of law as set forth in the document styled "Special Findings of Fact and Conclusions of Law Requested by Defendants", which is annexed hereto, and herewith filed and presented to the Court; and that in accordance therewith the Court do render and enter judgments in the above causes, in favor of [79] the defendants, and against the plaintiffs.

Dated: February 21, 1933.

CHALMERS, FENNEMORE & NAIRN,
BAKER & WHITNEY,
GERALD E. DUFFY,
JAMES E. LYONS,
BURTON MASON,
Attorneys for Defendants.

Received copy of within this 21st day of Feb. 1933.

SAMUEL WHITE,
Atty. for Pltf.

[Endorsed]: Filed Feb 21 1933. [80]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF SATURDAY, APRIL 15, 1933.

Messrs. Elliott & Snell, by Frank L. Snell, Jr., Esquire, and Samuel White, Esquire, appear as counsel for plaintiffs. Messrs. Baker & Whitney, by Alexander B. Baker, Esquire, appear as counsel for the defendants.

Upon motion of counsel for plaintiffs.

IT IS ORDERED that Findings of Fact and Conclusions of Law, be set for hearing and settlement, Friday, May 12, 1933, at the hour of ten o'clock A. M. [94]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF FRIDAY, MAY 12, 1933.

Findings of Fact and Conclusions of Law requested by plaintiffs; Defendants' Proposed Amendments and Additions thereto and Special Findings of Fact and Conclusions of Law Requested by Defendants come on regularly for hearing this day.

Messrs. Elliott & Snell, by Frank L. Snell, Jr., Esquire, and Messrs. White & Wilson, by Samuel White, Esquire, appear for Plaintiffs. Messrs. Chalmers, Fennemore & Nairn, by T. G. Nairn, Esquire, Gerald Duffy, Esquire, and Burton Mason, Esquire, appear for the Defendants.

Argument is had by respective counsel, and

IT IS ORDERED that Findings of Fact and Conclusions of Law shall be consolidated when it

appears that the destination of the shipment is the same and filed in the record of each case.

IT IS FURTHER ORDERED that the preamble proposed in the Special Findings of Fact and Conclusions of Law [95] Requested by Defendants be allowed and adopted and that Plaintiffs' Exception thereto be allowed; that Plaintiffs' Proposed Findings of Fact 5 and 6 in L-844-Phoenix and L-738-Phoenix, 7 in L-738-Phoenix, 8 in L-844-Phoenix, 6 and 7 in L-844-Phoenix, 10 and 11 in L-738-Phoenix, 9 in L-844-Phoenix, 8 and 9 in L-738-Phoenix, 12 and 13 in L-738-Phoenix, 10 and 11 in L-844-Phoenix be adopted, to each of which rulings and order of the Court the Defendants except, and that Plaintiffs' Proposed Findings of Fact 4 be rejected, to which ruling and order of the Court the Plaintiffs except;

That Defendants' Special Findings of Fact 1, 2, 3 and 4 be adopted, to each of which rulings and order of the Court the Plaintiffs except, and that said Special Findings of Fact 5, 16, 7, 8, 9, 10, 11, 12, 13, 14 and 15 be rejected, to each of which rulings and order of the Court the Defendants except, and that Defendants' Objection 11 be overruled, and that Defendants' exception be allowed;

That Plaintiffs' Conclusions of Law be adopted in lieu of the Conclusions of Law proposed by the Defendants, to which ruling and order of the Court the Defendants except.

IT IS FURTHER ORDERED that the Findings of Fact and Conclusions of Law as adopted be en-

grossed; that Judgments for the Plaintiffs in accordance with said engrossed Findings of Fact and Conclusions of Law be entered, and that an exception for Defendants be allowed to said order for Judgment. [96]

[Title of Court and Cause—Consolidated Cases.]

STIPULATION

to include certain exhibits in Findings of Fact and Conclusions of Law by reference.

It is stipulated and agreed that the Court in making its Findings of Fact and Conclusions of Law in the above entitled causes, may incorporate by reference "Exhibit B" attached to plaintiff's Complaint in cause No. L-738-Phoenix, and "Exhibit A" attached to plaintiff's Complaint in Cause No. L-844-Phoenix (both of which exhibits are also referred to as Rule V statements), with the same force and effect as if said exhibits and statements were physically incorporated in said Findings of Fact and Conclusions of Law.

Dated this 5th day of June, 1933.

ELLIOTT & SNELL,
SAMUEL W. WHITE,
FRANK L. SNELL, JR.,
Attorneys for Plaintiffs.
BAKER & WHITNEY,
Attorneys for Defendants. [97]

[Endorsed]: Filed Jun 8 1933. [98]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF THURSDAY, JUNE 8, 1933.

Findings of Fact and Conclusions of Law, having been presented to the Court in due time, together with the Proposed Amendments thereto, and settled by the Court on the 12th day of May, 1933, the Court now

ORDERS that the said Findings of Fact and Conclusions of Law be filed this 8th day of June, 1933, notwithstanding Rule 31 of this Court.

Thereupon, said Findings of Fact and Conclusions of Law are filed, and entered as follows, to-wit: [99]

[Title of Court and Cause—L-738-Phx.]

MEMORANDUM OF COSTS AND DISBURSEMENTS

DISBURSEMENTS

Marshal's Fees	$ 2.00
Clerk's Fees	10.00
Attorney fees allowed by the Court as provided by law	222.82
Examiner's Fees	
Witness Fees	
Certified copies from I.C.C. of Rule "V" Statements, report and findings, and order of reparation	3.90
Total	$ 238.72

United States of America
District of Arizona—ss.

Samuel White being duly sworn, deposes and says: That he is the Attorney for the plaintiff in the above-entitled cause, and as such has knowledge of the facts relative to the above costs and disbursements. That the items in the above memorandum contained are correct; that the said disbursements have been necessarily incurred in the said cause, and that the services charged therein have been actually and necessarily performed as therein stated.

SAMUEL WHITE

Subscribed and sworn to, before me, this 20 day of May, A. D. 1933.

[Seal] RUE VERA MORRIS
Notary Public.

My commission expires Feb. 28, 1937. [110]

To Baker & Whitney, Chalmers, Fennemore & Nairn, James E. Lyons, and Burton Mason, attorneys for defendants.

You will please take notice that on Tuesday the 13th day of June, A. D. 1933, at the hour of ten o'clock A. M. Plaintiff will apply to the Clerk of said Court to have the within memorandum of costs and disbursements taxed pursuant to the rule of said Court, in such case made and provided.

SAMUEL WHITE
Attorney for Plaintiff.

Service of within memorandum of costs and disbursements and receipt of a copy thereof acknowl-

edged, this 10 day of June, A. D. 1933.

BAKER & WHITNEY
Attorney for Defendants.

Plaintiff's Costs $238.72 taxed and entered this 19th day of June, 1933.

J. LEE BAKER, Clerk.
By George A. Hillier,
Deputy Clerk.

[Endorsed]: Filed Jun 10 1933. [111]

[Title of Court and Cause—L-738-Phx.]

DEFENDANTS' EXCEPTIONS TO STATEMENT OF COSTS.

NOW COMES the defendant and excepts to Plaintiffs' Statement of Costs and the following items thereof, to-wit:

1. To the item of $222.82, attorneys' fees, on the ground it is not recoverable as costs in that the amount is excessive to such an extent as to amount to an abuse by the Court of its discretion, and upon the further ground that attorneys' fees are allowable only if the plaintiff shall finally prevail, and this case has not been finally concluded, as defendants have notified Court and Counsel of their intention to appeal from the Judgment.

2. To the item of $3.90 for certified copies from the I. C. C. of Rule "V" Statements, etc., upon [112] the ground that the same is not recoverable

as costs and is merely an expense incidental to the preparation of the case for trial.

Dated: June 16, 1933.

BAKER & WHITNEY
CHALMERS, FENNEMORE & NAIRN
J. E. LYONS
GERALD E. DUFFY
BURTON MASON
Attorneys or Defendant.

Received copy of within Exceptions this 17th day of June, 1933.

SAMUEL WHITE
Attorney for Plaintiff.

Overruled. June 19, 1933, 9:30 A. M.

J. LEE BAKER, Clerk
By George A. Hillier,
Deputy Clerk.

[Endorsed]: Filed Jun 17, 1933. [113]

[Title of Court and Cause No. L-844-Phx.]

NOTICE OF APPLICATION TO TAX COSTS.

To the Clerk of said Court, and Baker and Whitney, Chalmers, Fennemore and Nairn, James E. Lyons, Burton Mason, and Gerald E. Duffy, Attorneys for Defendants:

Please take notice that the attorneys for the plaintiff will on the 13th day of June, 1933, at 10:00 o'clock A. M. make application to the Clerk of the court, at his office, to tax the costs incurred in said

action, as provided by law; and that a memorandum of the costs and necessary disbursements in said action is attached hereto and made a part of this notice.

Dated this 10th day of June, 1933.

ELLIOTT & SNELL,
Attorneys for Plaintiff.

STATEMENT OF COSTS.

To the Clerk of said Court, and Baker and Whitney, Chalmers, Fennemore and Nairn, James E. Lyons, Burton Mason, and Gerald E. Duffy, Attorneys for Defendants:

You and each of you are hereby notified that the plaintiff, Wheeler-Perry Company, claims as costs in the above entitled cause the sum of $397.66 for the following expenses incurred by it, viz.: [114]

Clerk's fees	$ 10.00
U. S. Marshal fees	2.00
Attorneys fees owed by Southern Pacific Company and Santa Maria Railroad Company as allowed by court	25.68
Attorneys fees owed by Southern Pacific Company as allowed by court	359.98
	$397.66

State of Arizona
County of Maricopa.—ss.

FRANK L. SNELL, Jr., being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the above named plaintiff, and as said attorney is better informed as to its costs expended in the above entitled cause than the said plaintiff; that the above items are correct, and that the disbursements above set forth have been necessarily incurred in the above action, and that said amouns hereinabove listed have been expended or incurred for the plaintiff in said cause.

FRANK L. SNELL, JR.

Subscribed and sworn to before me this 6 day of June, 1933.

My commission as Notary expires June 17, 1935.

(Seal) MARY KAVANAUGH

Notary Public in and for Maricopa County, State of Arizona.

Received the within this 10 day of June, 1933.

BAKER & WHITNEY

Attorneys for Defendants.

Plaintiff's Costs $397.66 taxed and entered this 19th day of June, 1933.

J. LEE BAKER, Clerk

By George A. Hillier,

Deputy Clerk.

[Endorsed]: Filed Jun 10 1933. [115]

[Title of Court and Cause No. L-844-Phx.]

DEFENDANTS' EXCEPTIONS TO STATEMENT OF COSTS.

NOW COME the defendants and except to Plaintiff's Statement of Costs and the following items thereof, to-wit:

1. To the item of $25.68, attorneys' fees, owed by Southern Pacific Company and Santa Maria Railroad Company, on the ground it is not recoverable as costs in that the amount is excessive to such an extent as to amount to an abuse by the Court of its discretion, and upon the further ground that attorneys' fees are allowable only if the plaintiff shall finally prevail and this case has not been finally concluded, as defendants have notified Court and Counsel of their intention to appeal from the Judgment.

2. To the item of $359.98, attorneys' fees, owed by Southern Pacific Company, on the ground it is not recoverable as costs in that the amount is excessive [116] to such an extent as to amount to an abuse by the Court of its discretion, and upon the further ground that attorneys' fees are allowable only if the plaintiff shall finally prevail and this case has not been finally concluded, as defendants have notified Court and Counsel of their intention to appeal from the Judgment.

DATED: June 16, 1933.

BAKER & WHITNEY
CHALMERS, FENNEMORE & NAIRN
GERALD E. DUFFY
J. E. LYONS
BURTON MASON
Attorneys for Defendants.

Copy of the within Exceptions received this 17th day of June, 1933.

ELLIOTT & SNELL
Attorney for Plaintiff.

Overruled June 19, 1933, 9:30 A. M.
J. LEE BAKER, Clerk
By George A. Hillier,
Deputy Clerk.

[Endorsed]: Filed June 17 1933. [117]

[Title of Court and Cause—Consolidated Cases.]

STIPULATION FOR CONSOLIDATION OF RECORD.

IT IS HEREBY STIPULATED that the records in the above two cases shall be consolidated for the purposes of appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and for the purpose of review by said United States Circuit Court of Appeals, or any other appellate court, and for such purpose it is sufficient that one set of Defendants' proposed amendments and additions to Findings of Fact and Conclusions of Law requested by plaintiffs, and one set of the Special Findings of Fact and Conclusions of Law requested by defendants, and one set of the Court's Findings of Fact and Conclusions of Law and one Bill of Exceptions, and one set of Assignments of Error be filed, [118] which may be marked and filed in cause No. L-738-Phoenix above named, and which shall be deemed to apply to all of the said cases

and that hereafter only one of all orders, documents, notices and papers shall be required to be filed, and may be filed in said cause No. L-738-Phoenix and shall be deemed to apply to all of said cases.

DATED at Phoenix, Arizona, this 19th day of June, 1933.

SAMUEL WHITE
ELLIOTT & SNELL
Attorneys for Plaintiffs.
BAKER & WHITNEY
JAMES E. LYONS
BURTON MASON
CHALMERS, FENNEMORE & NAIRN
GERALD E. DUFFY
Attorneys for Defendants.

[Endorsed]: Filed Jun 20 1933. [119]

[Title of Court and Cause—Consolidated Cases.]

ORDER FOR CONSOLIDATION OF RECORD

In accordance with stipulation of counsel it is hereby ordered that the records in the above two cases shall be consolidated for the purposes of appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and for the purpose of review by said United States Circuit Court of Appeals, or any other appellate court, and for such purpose it is sufficient that one set of Defendants'

proposed amendments and additions to Findings of Fact and Conclusions of Law requested by plaintiffs, and one set of the Special Findings of Fact and Conclusions of Law requested by defendants, and one set of the Court's Findings of Fact and Conclusions of Law, and [120] one Bill of Exceptions, and one set of Assignments of Error be filed, which may be marked and filed in cause No. L-738-Phoenix above named, and which shall be deemed to apply to all of the said cases and that hereafter only one of all orders, documents, notices and papers shall be required to be filed, and may be filed in said cause No. L-738-Phoenix and shall be deemed to apply to all of said cases.

Dated at Phoenix, Arizona, this 19th day of June, 1933.

F. C. JACOBS
District Judge.

[Endorsed]: Filed Jun 20 1933. [121]

[Title of Court and Cause—No. L-525.]

In the United States District Court
For the District of Arizona

MINUTE ENTRY OF WEDNESDAY,
APRIL 16, 1930
(Tucson General Minutes)

Plaintiff's Motion to Strike Portions of Defendant's Answer comes on regularly for hearing this

date. No counsel appears for any party. Whereupon,

IT IS ORDERED that this case be and it is hereby transferred to the Phoenix Division of this Court for further proceedings, pursuant to stipulation of counsel on file and approval of Honorable F. C. Jacobs, United States District Judge at Phoenix. [122]

[Title of Court and Cause—No. L-738.]

MINUTE ENTRY OF MONDAY, SEPTEMBER 12, 1932

Messrs. White & Wilson, by George T. Wilson, Esquire, appear as counsel for plaintiffs. Messrs. Baker & Whitney, by Alexander B. Baker, Esquire, appear as counsel for the defendant.

Plaintiff's Motion to Set for Trial is now regularly called, and

IT IS ORDERED that this case be, and the same is hereby set for trial at Phoenix, Tuesday, October 11, 1932, at the hour of ten o'clock, A. M. [129]

[Title of Court—Consolidated Cases.]

MINUTE ENTRY OF TUESDAY, OCTOBER 11, 1932

These cases come on regularly for trial this day, before the Court sitting without a Jury, a Jury

having been expressly waived upon the written stipulation of counsel heretofore filed herein. Counsel now stipulate to consolidate these cases for trial. Samuel White, Esquire, and V. R. Seed, Esquire, counsel for plaintiffs, F. J. Baffert and A. S. Leon, appear by Samuel White, Esquire.

Messrs. Elliott & Snell, by Frank L. Snell, Jr., Esquire, appear for plaintiff, Wheeler-Perry Company, a corporation.

Messrs. Baker & Whitney, Messrs. Chalmers, Fennemore & Nairn, and James E. Lyon, Esquire, counsel for Defendants, appear by Burton Mason, Esquire, Gerald Duffy, Esquire, and Thomas G. Nairn, Esquire.

Upon motion of Frank L. Snell, Jr., Esquire, and with the consent of counsel for Defendants,

IT IS ORDERED that plaintiff be granted leave to sign complaint in Law-844-Phoenix, Wheeler-Perry Company, a corpor- [130] ation, vs. Southern Pacific Company, a corporation, and Santa Maria Valley Railroad Company, a corporation.

L. O. Tucker, is now sworn to report the evidence in this case.

Upon motion of Samuel White, Esquire,

IT IS ORDERED that Frank L. Snell, Jr., Esquire, be entered as associate counsel in Law-738-Phoenix, F. J. Baffert and A. S. Leon, co-partners trading under the firm name of Baffert & Leon, vs. Southern Pacific Company, a corporation.

PLAINTIFF'S CASE:

The following plaintiffs' Exhibits are now admitted in evidence:

1. Bulletin, Interstate Commerce Commission, No. 16742.

2. Order, Interstate Commerce Commission, No. 16770.

3. Order, Interstate Commerce Commission, No. 17549, in case No. Law-738-Phoenix.

4. Rule, Interstate Commerce Commission, No. 16770, in case No. Law-844-Phoenix.

Upon stipulation of respective counsel,

IT IS ORDERED that Exhibit "B", attached to the Complaint in Law-738-Phoenix, stand as an Exhibit to the Complaint, in Law-844-Phoenix.

Whereupon, the plaintiffs rest.

Burton Mason, Esquire, of counsel for Defendants, now moves for a non-suit.

Argument is now had by respective counsel, and

IT IS ORDERED that said Motion be, and the same is hereby denied, to which ruling and order of the Court, the defendants except.

Said counsel for Defendants now move that Findings of Fact and Conclusions of Law be filed by the Court, at the conclusion of the trial hereof, and

IT IS ORDERED that said Motion be, and the same is [131] hereby granted.

DEFENDANTS' CASE:

J. L. Fielding, is now sworn and examined on behalf of the defendants.

The following Defendants' Exhibits are now admitted in evidence:

"A" Decision and Order, Docket No. 6806, Interstate Commerce Commission.

"B" Opinion and Order, Docket No. 11532, Interstate Commerce Commission.

"C" Opinion and Order, Docket No. 11442, Interstate Commerce Commission.

"D" Opinion and Order, Docket No. 13139, Interstate Commerce Commission.

"E" Statement of Carload Rates.

"F" Statement of Rates assessed carload shipments.

"G" Rate Authority No. 8016, Director General of Railroads.

"H" Letter from Director General of Railroads, Dated August 15, 1919.

Upon motion of Burton Mason, Esquire,

IT IS ORDERED that Defendants' Exhibits "G" and "H" may be withdrawn, and that photographic copies thereof be filed.

And thereupon, at the hour of 12:05 o'clock, P. M. IT IS ORDERED that the further trial of this case be continued to the hour of Two o'clock P. M., this date, to which time the parties and counsel are excused.

Subsequently, at the hour of Two o'clock, P. M., the parties and their respective counsel being present pursuant to recess, further proceedings of trial are had as follows:

DEFENDANTS' CASE CONTINUED: [132]

J. L. Fielding, heretofore sworn, is now recalled and further examined on behalf of the defendants.

And the defendants rest.

REBUTTAL:

L. G. Reif is now sworn and examined on behalf of the plaintiffs.

Plaintiffs' Exhibit No. 5, Statement of Rates, is now admitted in evidence.

Both sides rest.

Burton Mason, Esquire, now moves for Judgment for the Defendants in each case, and for the dismissal of the Complaints.

Whereupon, Frank L. Snell, Jr., Esquire, now moves for Judgment for plaintiffs in each case, as prayed in Plaintiffs' Complaints, and

IT IS ORDERED that said Motions be, and the same are hereby denied.

Upon motion of Burton Mason, Esquire,

IT IS ORDERED that Gerald Duffy, Esquire, be entered as associate counsel for the Defendants.

Thereupon, IT IS ORDERED that these cases be submitted upon briefs, and by the Court taken under advisement. [133]

[Title of Court and Cause—L-738]

MINUTE ENTRY OF THURSDAY, OCTOBER 13, 1932

Samuel White, Esquire, and Frank L. Snell, Jr., Esquire, appear as counsel for plaintiff. Burton Mason, Esquire, and Gerald Duffy, Esquire, appear as counsel for the defendant.

Frank L. Snell, Jr., Esquire, now moves to reopen this case for the purpose of introducing the testimony of Mr. Blaine, and

IT IS ORDERED that said Motion be, and the same is hereby denied, to which ruling and Order of the Court, the plaintiffs except.

Upon stipulation of respective counsel,

IT IS ORDERED that this case be set for oral argument, Monday, October 24, 1932, at the hour of ten o'clock, A. M. [134]

[Title of Court and Cause—L-738]

MINUTE ENTRY OF MONDAY, OCTOBER 17, 1932

IT IS ORDERED that the Order heretofore entered herein, setting this case for oral argument upon the Law and Facts, Monday, October 24, 1932, at the hour of ten o'clock, A.M., be, and the same is hereby vacated, and that this case be continued to be reset for oral argument upon stipulation of counsel. [135]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF FRIDAY, OCTOBER 21, 1932

No appearance is made on behalf of the Plaintiffs. Messrs. Baker & Whitney, by Alexander B. Baker, Esquire, and Messrs. Chalmers, Fennemore & Nairn, by Thomas G. Nairn, Esquire, appear as counsel for the defendants.

IT IS ORDERED that this case be set for oral argument upon the Law and Evidence, Monday,

November 14, 1932, at the hour of ten o'clock, A. M. [136]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF MONDAY, NOVEMBER 14, 1932

Samuel White, Esquire, and Messrs. Elliott & Snell, by Frank L. Snell, Jr., Esquire, appear as counsel for plaintiffs. Messrs. Chalmers, Fennemore & Nairn, by T. G. Nairn, Esquire; Messrs. Baker & Whitney, by Alexander B. Baker, Esquire; Gerald Duffy, Esquire, and Burton Mason, Esquire, appear as counsel for the defendants.

Pursuant to Trial heretofore had herein, argument is now had upon the Law and Facts.

Frank L. Snell, Jr., Esquire, opens said argument on behalf of the plaintiffs, and Burton Mason, Esquire, thereafter argues on behalf of the defendants.

And, thereupon, at the hour of 12:10 o'clock, P. M., IT IS ORDERED that further argument herein be continued to the hour of 1:00 o'clock, P. M., this date, to which time counsel are excused.

Subsequently, at the hour of 1:00 o'clock, P. M., respective counsel being present pursuant to recess, further [137] argument is had by Burton Mason, Esquire, and Gerald Duffy, Esquire.

And, thereupon, at the hour of 2:25 o'clock, P. M., IT IS ORDERED that further argument herein be continued to the hour of 2:30 o'clock, P. M., this date, to which time counsel are excused.

Subsequently, at the hour of 2:30 o'clock, P. M., respective counsel being present pursuant to recess, argument is now closed by Frank L. Snell, Jr., Esquire, of counsel for plaintiffs. [138]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF THURSDAY, DECEMBER 29, 1932

These cases having heretofore been tried before the Court sitting without a Jury, a Jury having been expressly waived upon Stipulation of the parties in writing, submitted upon oral argument, and upon briefs, and by the Court taken under advisement, and the Court having duly considered the same, and being fully advised in the premises, the Court finds in favor of the plaintiffs and against the defendants, and

IT IS ORDERED that counsel for plaintiffs prepare Findings of Fact and Conclusions of Law, and that exceptions be entered on behalf of the defendants, and

IT IS FURTHER ORDERED that these cases be continued for hearing to determine the amount of attorneys' fees to be awarded counsel for plaintiffs. [139]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF MONDAY,
JANUARY 9, 1933

Messrs. Elliott & Snell, by Frank L. Snell, Jr., Esquire, appear as counsel for plaintiffs. Messrs. Baker & Whitney, by Alexander B. Baker, Esquire, appear as counsel for the defendants.

Upon motion of said counsel for plaintiffs,

IT IS ORDERED that these cases be set for trial upon the matter of attorneys' fees, Tuesday, January 17, 1933, at the hour of ten o'clock, A. M. [140]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF TUESDAY,
JANUARY 17, 1933

Upon agreement of counsel, these cases are consolidated and come on regularly for hearing this date, upon the matter of attorneys' fees.

Messrs. Elliott & Snell, by Frank L. Snell, Jr., Esquire, and Samuel White, Esquire, by George T. Wilson, Esquire, appear as counsel for plaintiffs.

Messrs. Chalmers, Fennemore & Nairn, by T. G. Nairn, Esquire; Messrs. Baker and Whitney, by Alexander B. Baker, Esquire, and A. B. Mason, Esquire, appear as counsel for the defendants.

Upon stipulation of counsel, the statement of Samuel White is read into the record on behalf of the plaintiffs.

Upon motion of Frank L. Snell, Jr., Esquire,

IT IS ORDERED that George T. Wilson, Es-

quire, be entered as associate counsel for plaintiffs.

Frank L. Snell, Jr., is sworn and examined on behalf of plaintiffs. [141]

A. B. Mason is sworn and examined on behalf of the defendants.

Both sides rest.

Whereupon, the cause is now submitted to the Court, and the Court having duly considered the same, and being fully advised in the premises,

IT IS ORDERED that plaintiffs' attorneys fees be fixed at twenty per cent (20%) of the amount of Judgment in each case, and that an exception be entered on behalf of the defendants. [142]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF TUESDAY, JUNE 13, 1933

This being the time heretofore fixed for taxing plaintiff's costs herein, Messrs. Elliott and Snell, by Frank L. Snell, Jr., Esquire, appear for plaintiff, and Messrs. Baker and Whitney, by Alexander B. Baker, Esquire, appear for Defendants.

Upon motion of counsel for defendants, and upon the consent of counsel for plaintiff,

IT IS ORDERED that the taxing of costs herein be continued and reset for Monday, June 19, 1933, at the hour of 9:30 o'clock, A. M.

Upon motion of Alexander B. Baker, Esquire,

IT IS ORDERED that the Defendants' time be extended for a period of forty (40) days from and after this date, within which to prepare, serve and file Bill of Exceptions. [145]

[Title of Court and Cause.—L-738.]

MINUTE ENTRY OF MONDAY, JUNE 19, 1933

Messrs. Elliott and Snell, by Frank L. Snell, Jr., Esquire, and Samuel White, Esquire, appear for Plaintiff.

Messrs. Baker and Whitney, by Alexander B. Baker, Esquire, appear for the Defendants.

Objection to the decision of the Clerk in taxing plaintiff's costs is now made to the Court by said counsel for the defendants, and particularly to the items of attorneys' fees and certified copies of Rule V of the Interstate Commerce Commission, and

IT IS ORDERED that said objection be overruled, and that the decision of the Clerk in allowing said costs be, and the same is hereby affirmed, to which ruling and Order of the Court, the defendants except.

Upon motion of Alexander B. Baker, Esquire,

IT IS ORDERED that Stay of Execution of Judgment be extended for a period of forty (40) days from and after June 13, 1933. [146]

[Title of Court and Cause—No. L-569.]

MINUTE ENTRY OF MONDAY,
JANUARY 11, 1932.
(Tucson General Minutes)

ORDER TRANSFERRING CASE TO
PHOENIX DIVISION.

Upon stipulation of respective counsel, heretofore filed herein, and it appearing to the Court that the Honorable F. C. Jacobs, United States District Judge for the District of Arizona, has filed his consent thereto,

IT IS ORDERED that this case be transferred to the Phoenix Division of this Court for further proceedings. [149]

[Title of Court and Cause—No. L-844.]

MINUTE ENTRY OF MONDAY,
SEPTEMBER 12, 1932.

Messrs. Elliott & Snell, by Frank L. Snell, Jr., Esquire, appear as counsel for plaintiff. Messrs. Baker & Whitney, by Alexander B. Baker, Esquire, appear as counsel for the defendants.

Plaintiff's Motion to Set for Trial is now regularly called, and

IT IS ORDERED that this case be, and the same is hereby set for trial, Tuesday, October 11, 1932, at the hour of ten o'clock A. M. [154]

[Title of Court and Cause—No. L-844.]

MINUTE ENTRY OF THURSDAY, OCTOBER 13, 1932.

Samuel White, Esquire, and Frank L. Snell, Jr., Esquire, appear as counsel for plaintiff. Burton Mason, Esquire, and Gerald Duffy, Esquire, appear as counsel for the defendants.

Frank L. Snell, Jr., Esquire, now moves to re-open this case for the purpose of introducing the testimony of Mr. Blaine, and

IT IS ORDERED that said Motion be, and the same is hereby denied, to which ruling and Order of the Court, the plaintiff excepts.

Upon stipulation of respective counsel,

IT IS ORDERED that this case be set for oral argument, Monday, October 24, 1932, at the hour of ten o'clock, A. M. [155]

[Title of Court and Cause—No. L-844.]

MINUTE ENTRY OF MONDAY,
OCTOBER 17, 1932.

IT IS ORDERED that the Order heretofore entered herein, setting this case for oral argument upon the Law and Facts, Monday, October 24, 1932, at the hour of ten o'clock, A. M., be, and the same is hereby vacated, and that this case be continued to be reset for oral argument upon stipulation of counsel. [156]

[Title of Court and Cause—No. L-844.]

MINUTE ENTRY OF MONDAY,
JUNE 19, 1933.

Messrs. Elliott and Snell, by Frank L. Snell, Jr., Esquire, and Samuel White, Esquire, appear for Plaintiff.

Messrs. Baker and Whitney, by Alexander B. Baker, Esquire, appear for the Defendants.

Objection to the decision of the Clerk in taxing plaintiff's costs is now made to the Court by said counsel for the defendants, and particularly to the item of attorneys' fees, and

IT IS ORDERED that said objection be overruled, and that the decision of the Clerk in allowing said costs be, and the same is hereby affirmed, to which ruling and Order of the Court, the defendants except.

Upon motion of Alexander B. Baker, Esquire,

IT IS ORDERED that Stay of Execution of Judgment be extended for a period of forty (40) days from and after June 13, 1933. [159]

[Title of Court and Cause—No. L-844.]

MINUTE ENTRY OF MONDAY, JULY 24, 1933

IT IS ORDERED that the Judgment heretofore entered June 9, 1933, be corrected, and that said Judgment provide for attorneys' fees recoverable from the Defendant, Southern Pacific Company, a corporation, in the sum of Three Hundred Thirty Four and 31/100 Dollars ($334.31) instead of Three Hundred Fifty Nine and 98/100 Dollars ($359.98), in accordance with the Stipulation on file herein. [160]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF MONDAY, JULY 10, 1933

IT IS ORDERED that Defendants may have until and including the 1st day of September, 1933, within which to serve and file Bill of Exceptions, in accordance with the Stipulation on file herein. [161]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF WEDNESDAY, AUGUST 30, 1933

Upon motion of T. G. Nairn, Esquire, of counsel for Defendants, and upon his representation that said Motion is made upon Plaintiffs' request,

IT IS ORDERED that Plaintiffs' time within which to file proposed Amendments and Excep-

tions to Bill of Exceptions on file herein, be, and the same is hereby extended to and including September 9, 1933. [162]

[Title of Court and Cause—Consolidated Cases.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that on or about the 11th day of October, 1932, the above entitled causes came on regularly for trial before the Honorable F. C. Jacobs, United States Judge in and for the District of Arizona, sitting without a jury, a jury trial having been expressly waived by written stipulation of the parties. Pursuant to oral stipulation of the parties duly expressed in open court, and by order of Court then and there made, said causes were duly consolidated for purposes of trial and decision, and were jointly tried upon a consolidated record. Plaintiffs appeared by their counsel, Samuel White and F. L. Snell, Jr., Esquires, of Phoenix, Arizona, and defendants by their counsel, Messrs. Baker & Whitney, and Chalmers, Fennemore & Nairn, of Phoenix, Arizona, and James E. Lyons, Gerald E. Duffy and Burton Mason, Esquires, of San Francisco, California. [163]

Thereupon, there was offered and received in evidence as Plaintiffs' Exhibit 1, a copy of the opinion and order of the Interstate Commerce Commission in Docket 16742 and associated cases, Traffic Bureau, Phoenix Chamber of Commerce, et al. v. The A. T. & S. F. Ry. Co., et al., 140 I. C. C. 171. A duly cer-

tified true and correct copy of said opinion and order in said Docket 16742 is attached as Exhibit "A" to the complaint of the plaintiffs on file in cause No. L-738-Phoenix; and to save repetition the same is hereby referred to and made a part hereof, with the same force and effect as if here set forth.

Thereupon, there was offered and received in evidence as Plaintiffs' Exhibit 2, a copy of an order for the payment of reparation made by the Interstate Commerce Commission under date of April 13, 1931, in Docket 16770 and associated cases, Bashford-Burmister Company v. The A. T. & S. F. Ry. Co., et al. A true and correct copy of said order so received as Exhibit 2 is annexed as Exhibit "B" to the complaint of the plaintiff in cause No. L-844-Phoenix; and to save repetition the same is hereby referred to and made a part hereof, with the same force and effect as if here set forth.

Thereupon, there was offered and received in evidence as Plaintiffs' Exhibit 3, a copy of an order for the payment of reparation made by the Interstate Commerce Commission under date of September 7, 1929, in Docket 17549, Phelps-Dodge Mercantile Company v. A. T. & S. F. Ry. Co., et al. A true and correct copy of said order so received as Exhibit 3 is annexed as Exhibit "C" to the complaint of plaintiffs in cause No. L-738-Phoenix; and to save repetition the same is hereby referred to and made a part hereof, with the same force and effect as if here set forth.

Thereupon, there was offered and received in evi-

dence as Plaintiffs' Exhibit 4, a true and correct copy of certain statements (also known as Rule V statements) showing shipments made to and received by plaintiff in cause No. L-844-Phoenix, upon which repara- [164] tion was and is claimed by said plaintiff. A full, true and correct copy of said Exhibit 4 is annexed as Exhibit "A" to the complaint of said plaintiff in cause No. L-844-Phoenix; and to save repetition the same is hereby referred to, and made a part hereof, with the same force and effect as if here set forth.

Thereupon, it was stipulated and agreed, by and between counsel for plaintiffs and defendants, that Exhibit "B" annexed to the plaintiffs' complaint in cause No. L-738-Phoenix, being the statements (also known as Rule V statements) showing the shipments made to and received by said plaintiffs in cause No. L-738-Phoenix, upon which reparation was and is claimed by said plaintiffs, might be considered in evidence, with the same force and effect as if physically introduced in evidence; and the same is accordingly referred to and made a part hereof, with the same force and effect as if here set forth.

Thereupon, it was further stipulated and agreed, by and between counsel for plaintiffs and defendants, that plaintiffs had duly made demand upon defendants for the payment of the amounts claimed as reparation, pursuant to the aforesaid reparation orders of said Commission; and that defendants had declined to comply with said demands.

It was further stipulated and agreed, by and between counsel for plaintiffs and defendants, that the aforesaid Rule V statements had been duly prepared in accordance with instructions of said Commission, for the purpose of showing detailed information respecting the shipments upon which reparation was and is claimed, that such detailed information shown thereon is correct, and that the copies of said Rule V statements here introduced in evidence by plaintiffs, either physically or by reference, were and are true and correct copies of the original statements transmitted to said Commission. Thereupon plaintiffs rested.

Thereupon, defendants moved the Court to render and enter an [165] order for a non-suit against the plaintiffs in each of said causes, and for the dismissal of the complaints, and for the entry of judgments against the plaintiffs and in favor of the defendants, upon the ground that the evidence introduced by plaintiffs failed to sustain the causes of action alleged in the complaints, or any cause of action against the defendants, and that said evidence showed affirmatively that the orders for reparation, upon which the complaints are based, were and are invalid, in that the Interstate Commerce Commission had no power or jurisdiction to make said orders, for the reason that the rates assessed upon said shipments, against which said Commission has undertaken to award reparation, had previously been approved as reasonable by said Commission, after full formal investigation, and/or were less in

amount than rates so approved, which remained in effect throughout the period of movement of said shipments without any change on the part of the defendants, or otherwise except as ordered or required by said Commission and/or the Director-General of Railroads, other than certain voluntary reductions. Said motion of defendants was denied and overruled by the Court, to which ruling defendants then and there duly excepted.

Thereupon, it was stipulated and agreed, by and between counsel for the respective parties, that the reports of the Interstate Commerce Commission in Ex Parte 74, Increased Rates 1920, 58 I. C. C. 220, and Reduced Rates 1922, 68 I. C. C. 676, might be considered in evidence, and referred to by the Court or either party, without the necessity that said reports, or either of them, be physically incorporated in the record.

Thereupon, counsel for plaintiffs and defendants joined in requesting the Court to make, enter and file written findings of fact and conclusions of law in said causes, prior to rendering judgments.

Thereupon there was offered in evidence by the defendants, and received as Exhibit "A", a true and correct copy of the report and order of the said Commission in Docket 6806, Arizona Corporation Commission v. A. T. & S. F. Ry. Co., et al., 34 I. C. C. 158, in words and figures as follows: [175]

EXHIBIT "A"

3024

INTERSTATE COMMERCE COMMISSION.

No. 6806.

ARIZONA CORPORATION COMMISSION

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, ET AL. [167]

No. 6806.

ARIZONA CORPORATION COMMISSION

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, ET AL.

Submitted November 30, 1914.

Decided May 25, 1915.

The complaint attacks as unreasonable the rates on sugar and sirup in straight and mixed carloads from producing and refining points in California to all points in Arizona. Subsequent to the hearing the carriers published reduced rates on these commodities to many points of destination in the state; Held:

1. Except as to the rates to Phoenix and Prescott, Ariz., the evidence of record does not show that the rates in effect at the time of the hearing on sugar and sirup in straight carloads, minimum weight 36,000 pounds, were unreasonable to a greater extent than the amounts of the reductions since made.
2. Rates to Phoenix and Prescott ordered to be established for the future upon a basis of not

more than 5 cents per 100 pounds higher than the rates to the junction points.

3. No finding is made as to the rates on sugar and sirup in mixed carloads.

F. A. Jones for Arizona Corporation Commission.

F. H. Wood for Southern Pacific Company and Arizona Eastern Railroad Company.

T. J. Norton and E. W. Camp for Atchison, Topeka & Santa Fe Railway Company.

Hawkins & Franklin for El Paso & Southwestern Company.

REPORT OF THE COMMISSION.

DANIELS, Commissioner:

The Arizona Corporation Commission brings the proceeding against all carriers which are engaged in the transportation of sugar and sirup from points of origin in the state of California to points of destination in the state of Arizona. It is alleged that the rates on sugar and sirup, in straight and mixed carloads, from all refining and shipping points in the state of California to all points in the state of Arizona are unjust and unreasonable. It is not alleged, however, that the rates under attack cause any discrimination.

Substantial reductions have been made in the rates on sugar and sirup from California to Arizona points as a result of two recent decisions of the Commission, one of which has been announced since [168] this proceeding was commenced. In Maier & Co. v. S. P. Co., 29 I. C. C., 103, a rate of 90 cents per 100 pounds for the transportation of sugar in carloads, minimum weight 36,000 pounds, from Los Angeles and Los Alamitos, Cal., to Ben-

son, Ariz., was found to be unreasonable and in violation of the fourth section of the act. It was held that the rate to this point was unreasonable in so far as it was in excess of 60 cents.

In conformity with this decision the rate from Los Angeles to Benson was made 60 cents, effective March 15, 1914, and by the same tariff reductions were made to 60 cents in all rates which had exceeded 60 cents from the same point to main-line stations of the Southern Pacific in Arizona. Substantial reductions were also made in the rates on sugar from San Francisco. Prior to March 15, 1914, rates from this point were graded from 85 cents at Yuma, Ariz., to 100 cents at Bowie, Ariz., minimum weight 36,000 pounds. Effective on that date the rates from San Francisco to all points in Arizona on the main line of the Southern Pacific were fixed at 70 cents with the same minimum, and they have now been reduced to 60 cents, thereby putting them upon the same basis as those from Los Angeles. San Francisco has also been accorded the Los Angeles rates to other Arizona points.

This complaint was filed on April 15, 1914. At that time certain applications for relief from the provisions of the fourth section which concerned some of the rates here involved were pending before the Commission. These applications were decided after the hearing of the issues in this case and are reported in Fourth Section Violations in Rates on Sugar, 31 I. C. C., 511. Reference is made to the report in that case for a full statement of the facts and issues there involved. It is sufficient here to state that our order in that case denied authority

to continue lower rates on sugar from San Francisco and other sugar-producing points in California to Trinidad, Colo., and other points east thereof, than the rates concurrently applicable on like traffic to intermediate points on the line of the Santa Fe. The order also denied authority to the Southern Pacific, El Paso & Southwestern, and the Chicago, Rock Island & Pacific to continue lower rates on sugar from San Francisco and other sugar-producing points in California to the Missouri River than the rates concurrently applicable to intermediate points west of Tucumcari, N. Mex. Pursuant to the orders made in Fourth Section Violations in Rates on Sugar, supra, the carriers filed new schedules of rates effective in November and December, 1914, which work substantial reductions in the rates which were in effect when this complaint was filed.

A further change in rates should be noted. Effective November 15, 1914, rates on sugar were established to practically all Arizona [169] points conditioned upon a minimum weight of 60,000 pounds, which rates were the same from all California producing points, and almost uniformly on a basis of 5 cents lower than the rates from Los Angeles to the same destinations upon the 36,000-pound minimum. A desire for these lower rates with the higher minimum was expressed by complainant's witnesses.

The following table, in which certain points are taken as representative of all points of destination in Arizona, shows the recent reductions in rates on sugar to which we have referred in the foregoing paragraphs. Rates are stated per 100 pounds:

To—	From Los Angeles, Cal., effective—			From San Francisco, Cal., effective—		
	Prior to Mar. 15, 1914.[1]	Mar. 15, 1914, or subsequently.[1]	Nov. 15, 1914, or subsequently.[2]	Prior to Mar. 15, 1914.[1]	Mar. 15, 1914, or subsequently.[1]	Nov. 15, 1914, or subsequently.[2]
Main-line Santa Fe stations:						
Kingman, Ariz.	$0.72	$0.60	$0.55	$0.82	$0.60	$0.55
Ashfork, Ariz.	.83	.60	.55	.93	.60	.55
Flagstaff, Ariz.	.92	.60	.55	1.00	.60	.55
Holbrook, Ariz.	1.00	.60	.55	1.00	.60	.55
Via Santa Fe, Prescott & Phoenix: Prescott, Ariz.	.83	.75	.70	.93	.75	.70
Main-line Southern Pacific stations:						
Yuma, Ariz.	.66	.60	.53	.85	.60	.55
Kim, Ariz.	.83	.60	.55	.93	.60	.55
Maricopa, Ariz.	.83	.60	.55	.93	.60	.55
Tucson, Ariz.	.83	.60	.55	.93	.60	.55
Benson, Ariz.	.90	.60	.55	1.00	.60	.55
Cochise, Ariz.	.90	.60	.55	1.00	.60	.55
Bowie, Ariz.	.90	.60	.55	1.00	.60	.55
Via branch line Southern Pacific: Nogales, Ariz.	.90	.82	.77	1.00	.82	.77
Via Arizona Eastern:						
Phoenix, Ariz.	.83	.75	.70	.93	.75	.70
Globe, Ariz.	1.30	1.00	.....	1.40	1.00	.....
Kelton, Ariz.	1.05	.75	.70	1.15	.75	.70
Via El Paso & Southwestern:						
Bisbee, Ariz.	.90	.60	.55	1.00	.60	.55
Douglas, Ariz.	.90	.60	.55	1.00	.60	.55
Via Arizona & New Mexico:						

Substantial reductions in the rates on sirup have also been recently made. Taking the stations named in the foregoing table the rates on sirup from Los Angeles in effect prior to March 15, 1914, compared with the present rates show the following reductions in cents per 100 pounds: To Yuma, from 66 to 53; to Kim, from 83 to 63; to Maricopa and Tucson, from 83 to 75; to Benson, Cochise, and Bowie, from 90 to 75; to Globe, from 130 to 115; to Kelton, from 105 to 90; to Bisbee and Douglas, from 90 to 75; to Clifton, from 121 to 106. The rates to Kingman, 72 cents, to Ashfork, Flagstaff, Holbrook, Phoenix, and Prescott, 75 cents, remain unchanged. It appears that the rate to Florence has been increased from 75 to 80 cents, and that the rate to Nogales has been increased from 90 to 97 cents. Relatively similar reductions have been made in the rates on sirup from [170] San Francisco. The minimum weight prescribed for the rates on sirup is 36,000 pounds. Rates have not been established for the minimum weight of 60,000 pounds, as in the case of sugar.

Prior to March 15, 1914, the rates on mixed carloads of sugar and sirup, minimum weight 36,000 pounds, from Los Angeles and San Francisco to Arizona points were substantially the same as the rates then in effect on sugar. In December, 1914, the commodity rates applicable to mixed carloads were canceled, leaving fifth-class rates applicable to all points in Arizona. To certain of these points the fifth-class rates were reduced, effective November

To—	From Los Angeles, Cal., effective—			From San Francisco, Cal., effective—		
	Prior to Mar. 15, 1914.[1]	Mar. 15, 1914, or subsequently.[1]	Nov. 15, 1914, or subsequently.[2]	Prior to Mar. 15, 1914.[1]	Mar. 15, 1914, or subsequently.[1]	Nov. 15, 1914, or subsequently.[2]
Main-line Santa Fe stations:						
Kingman, Ariz.	$0.72	$0.60	$0.55	$0.82	$0.60	$0.55
Ashfork, Ariz.	.83	.60	.55	.93	.60	.55
Flagstaff, Ariz.	.92	.60	.55	1.00	.60	.55
Holbrook, Ariz.	1.00	.60	.55	1.00	.60	.55
Via Santa Fe, Prescott & Phoenix: Prescott, Ariz.	.83	.75	.70	.93	.75	.70
Main-line Southern Pacific stations:						
Yuma, Ariz.	.66	.60	.53	.85	.60	.55
Kim, Ariz.	.83	.60	.55	.93	.60	.55
Maricopa, Ariz.	.83	.60	.55	.93	.60	.55
Tucson, Ariz.	.83	.60	.55	.93	.60	.55
Benson, Ariz.	.90	.60	.55	1.00	.60	.55
Cochise, Ariz.	.90	.60	.55	1.00	.60	.55
Bowie, Ariz.	.90	.60	.55	1.00	.60	.55
Via branch line Southern Pacific: Nogales, Ariz.	.90	.82	.77	1.00	.82	.77
Via Arizona Eastern:						
Phoenix, Ariz.	.83	.75	.70	.93	.75	.70
Globe, Ariz.	1.30	1.00	.....	1.40	1.00	.....
Kelton, Ariz.	1.05	.75	.70	1.15	.75	.70
Via El Paso & Southwestern:						
Bisbee, Ariz.	.90	.60	.55	1.00	.60	.55
Douglas, Ariz.	.90	.60	.55	1.00	.60	.55
Via Arizona & New Mexico:						
Clifton, Ariz.	1.21	.91	.86	1.31	.91	.86

1. Minimum weight, 36,000 pounds.

2. Minimum weight, 60,000 pounds.

Substantial reductions in the rates on sirup have also been recently made. Taking the stations named in the foregoing table the rates on sirup from Los Angeles in effect prior to March 15, 1914, compared with the present rates show the following reductions in cents per 100 pounds: To Yuma, from 66 to 53; to Kim, from 83 to 63; to Maricopa and Tucson, from 83 to 75; to Benson, Cochise, and Bowie, from 90 to 75; to Globe, from 130 to 115; to Kelton, from 105 to 90; to Bisbee and Douglas, from 90 to 75; to Clifton, from 121 to 106. The rates to Kingman, 72 cents, to Ashfork, Flagstaff, Holbrook, Phoenix, and Prescott, 75 cents, remain unchanged. It appears that the rate to Florence has been increased from 75 to 80 cents, and that the rate to Nogales has been increased from 90 to 97 cents. Relatively similar reductions have been made in the rates on sirup from [170] San Francisco. The minimum weight prescribed for the rates on sirup is 36,000 pounds. Rates have not been established for the minimum weight of 60,000 pounds, as in the case of sugar.

Prior to March 15, 1914, the rates on mixed carloads of sugar and sirup, minimum weight 36,000 pounds, from Los Angeles and San Francisco to Arizona points were substantially the same as the rates then in effect on sugar. In December, 1914, the commodity rates applicable to mixed carloads were canceled, leaving fifth-class rates applicable to all points in Arizona. To certain of these points the fifth-class rates were reduced, effective November

27, 1914. From Los Angeles to Yuma this reduction is from 66 to 53 cents; to Kim, from 83 to 63 cents; from San Francisco to Yuma the reduction is from 85 to 75 cents; to Kim, from 93 to 81 cents. The effect of these class-rate reductions is to make lower rates on the mixture of sugar and sirup to these two points than were formerly in effect. To certain other points the commodity rates formerly applicable were the same as the fifth-class rates. In the main, however, the cancellation of commodity rates applicable to mixed carloads of sugar and sirup has resulted in increased rates on this mixture.

An analysis of the changes made in the rates on sugar and sirup, as outlined in the foregoing paragraphs, shows that the rates now in effect to many Arizona points are substantially lower than when this proceeding was brought. It appears, also, however, that the rates to the main-line points which were formerly graded are now largely blanketed to all of these points. It is further to be noted that the destinations on branch lines have not been accorded the full reductions made to main-line points. The rate formerly in effect on sugar from Los Angeles both to Maricopa and Phoenix, with the minimum weight of 36,000 pounds, was 83 cents. The rates as reduced are now 60 and 75 cents, respectively, a differential of 15 cents to the branch-line point over the rate to the junction point on the main line.

Complainant's evidence, other than that relating to commercial conditions, consisted in the main of

exhibits comparing the rates to Arizona points which were in effect when this proceeding was brought with rates on sugar applicable to other movements. In view of the changes in the Arizona rates as above set forth, these exhibits are less persuasive upon the present adjustment of rates than upon the rates as established prior to those changes. Upon examination of all the evidence of record, we are of the opinion and find that the rates on sugar and sirup in straight carloads from points in California to points in Arizona in effect at the time of the hearing have not been shown to be unreasonable to a greater extent than the amounts of the reductions since made. In view of the fact, however, that the carriers have to a considerable extent disregarded distance as a [171] factor in the making of the California-Arizona sugar rates, having established extensive blankets both as to origin and destination points, it is the opinion of the Commission that the present rates to Phoenix via the Southern Pacific and the Arizona Eastern and to Prescott via the Santa Fe are unreasonable in so far as they exceed the rates to the junction points by more than 5 cents per 100 pounds, and that rates for the future should be established upon a basis of not more than 5 cents per 100 pounds over the junction point rates.

The facts of record being insufficient to warrant any finding as to the rates on mixed carloads of sugar and sirup, none will be made.

An order will be entered in accordance with the conclusions herein stated. [172]

ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 25th day of May, A, D. 1915.

No. 6806.

ARIZONA CORPORATION COMMISSION

v.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY; ARIZONA EASTERN RAILROAD COMPANY; ARIZONA & NEW MEXICO RAILWAY COMPANY; SOUTHERN PACIFIC COMPANY; EL PASO & SOUTHWESTERN COMPANY; AND SANTA MARIA VALLEY RAILROAD.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before August 15, 1915, and thereafter to abstain, from charging, demanding, collecting, or receiving their present rates for the transportation of sugar in carloads, minimum weight 36,000 pounds, from points in California to Prescott and Phoenix, Ariz., which said rates have been

found in said report to be unreasonable.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified, and required to establish, on or before August 15, 1915, upon notice to the Interstate Commerce Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed by section 6 of the act to regulate commerce, and thereafter to maintain and apply to the transportation of sugar in carloads, minimum weight 36,000 pounds, from points in California to Prescott, Ariz., [173] via Ashfork, Ariz., rates which shall not exceed those contemporaneously in effect from the same points of origin to Ashfork by more than 5 cents per 100 pounds, and to Phoenix, Ariz., via Maricopa, Ariz., rates which shall not exceed those contemporaneously in effect to Maricopa by more than 5 cents per 100 pounds.

And it is further ordered, That this order shall continue in force for a period of not less than two years from the date when it shall take effect.

By the Commission.

[Seal] GEORGE B. McGINTY,
Secretary. [174]

Thereupon there was offered in evidence by defendants, and received as Exhibit "B", a true and correct copy of the report and order of said Commission in Docket 11532, Traffic Bureau, Phoenix Chamber of Commerce v. Director General, et al., 62 I. C. C. 412, in words and figures as follows: [176]

EXHIBIT "B"

No. 11532

TRAFFIC BUREAU, CHAMBER OF COMMERCE, PHOENIX, ARIZ., ET AL.

v.

DIRECTOR GENERAL, AS AGENT, SOUTHERN PACIFIC COMPANY, ET AL.

Submitted April 12, 1921. Decided June 22, 1921.

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1. Rates on sugar, in carloads, from California points to Phoenix, Ariz., found unreasonable. Reasonable rate prescribed for the future.
2. Following Phoenix Chamber of Commerce v. Director General, 62 I. C. C. 368, prayer for the establishment of through routes and joint rates from San Francisco, Calif., by way of Phoenix, to points on the Southern Pacific, Maricopa, Ariz., to El Paso, Tex., denied.

Roland Johnston, for complainants.

F. A. Jones for Arizona Corporation Commission, intervener.

E. W. Camp, Elmer Westlake, G. H. Baker, and M. A. Cummings for defendants.

REPORT OF THE COMMISSION.

Division 1, Commissioners McChord, Aitchison, and Lewis.

AITCHISON, Commissioner:

This case was made the subject of a proposed report by the examiner. Exceptions thereto were filed by defendants.

Complainants are the Traffic Bureau, Chamber of Commerce, Phoenix, Ariz., an organization of shippers and citizens of Phoenix, Hall-Pollock Company, and Haas-Baruch & Company, corporations, and the Arizona Grocery Company, a partnership.

The three firms named are engaged in the grocery business at Phoenix. By complaint filed June 14, 1920, they allege that the rates charged by defendants for the transportation of sugar from points in California to Phoenix, were and are unjust, unreasonable, unjustly discriminatory, and unduly prejudicial in violation of sections 1, 2, 3, and 4 of the interstate commerce act and section 10 of the federal control act. They ask us to prescribe just and reasonable rates for the future, to award reparation on all shipments moving subsequently to May 2, 1916, and to establish through routes and joint rates from San Francisco, Calif., by way of Phoenix, to Maricopa, Ariz., and points east thereof, on lines of the Southern Pacific Company, to and including El Paso, Tex. The Arizona Cor- [176] poration Commission intervened on behalf of complainants. The allegation of a fourth section violation was abandoned at the hearing. Rates are stated herein in amounts per 100 pounds.

Phoenix is the only point in Arizona common to the lines of the Atchison, Topeka & Santa Fe Railway and the Southern Pacific. It is located on the branch of the Santa Fe extending south from Ash Fork, Ariz., but is served by that carrier on traffic from California by means of a branch line known as the Parker cut-off, which leaves the main line

at Cadiz, Calif., and connects with the Ash Fork branch at Wickenburg, Ariz. Phoenix is served by the Southern Pacific through the medium of the Arizona Eastern Railroad, which it owns and with which it connects at Maricopa, a point on the main line 35 miles southerly from Phoenix. The short-line mileage from San Francisco to Phoenix is via the Santa Fe over the Parker cut-off; from Los Angeles, via the Southern Pacific lines.

Sugar is produced at various points in California. Hawaiian cane sugar is refined at San Francisco and at Crockett, a point 29 miles east of San Francisco on the Southern Pacific; beet sugar is produced at Alvarado, Betteravia, Spreckels, Los Alamitos, Dyer, Delhi, Oxnard, and other points in the central and southern portions of the state. For the purpose of stating rates to Arizona, the refining and producing points of origin in California are included in one group. Rates on sugar from California are also grouped as to destination points. On the main line of the Santa Fe a destination group extends from Yucca, Ariz., to El Paso, and on the main line of the Southern Pacific from Yuma, Ariz., to El Paso. Los Angeles is the nearest point in the California group to Phoenix, and San Francisco possibly the farthest. The distances to Phoenix via the Santa Fe are 489 and 800 miles, and via the Southern Pacific, 451 and 920 miles, respectively, from the two points of origin.

On May 1, 1916, the rates on sugar from the California group to Phoenix were 60 cents, minimum weight 60,000 pounds, and 65 cents, minimum weight

36,000 pounds. Contemporaneously rates from the California group to points in the destination groups described were 5 cents lower than the corresponding Phoenix rates. This difference of 5 cents in favor of main-line points was fixed by us in Arizona Corporation Commission v. A., T. & S. F. Ry. Co., 34 I. C. C., 158, in which we found the Phoenix rate of 75 cents, minimum 36,000 pounds, unreasonable to the extent that it exceeded, by more than 5 cents, the main-line rate to Maricopa. On June 25, 1918, these rates were increased 25 per cent, the main-line rates becoming 69 and 75 cents and the Phoenix rates 75 and 81.5 cents. Subsequently a flat increase of 22 cents was substituted for the percentage increases, and the rates to main-line points became 77 and 82 cents on November [177] 25, 1919, and to Phoenix, 82 and 87 cents on February 18, 1920. On February 29, 1920, defendants canceled the rates to main-line and branch-line points, including Phoenix, under the lower minimum weight published in connection with roads under federal control and, as to such roads, increased the Phoenix rate under the minimum weight of 60,000 pounds to 83.5 cents which, apparently, was done by advancing the 5-cent difference over main-line points to 6.5 cents. In schedules filed to become effective May 14, 1920, the carriers attempted to bring the rates of non-federal lines into harmony with those of the lines previously under federal control, but upon protest we suspended the items carrying such increases. In Sugar from California Points to Arizona, 58 I. C. C. 737, we held that the cancellation of the 36,000 pound

minimum was justified and vacated the order of suspension. The present rates, including the general increases authorized by us on July 29, 1920, are 96.5 cents to main-line points and $1.045 to Phoenix, minimum weight 60,000 pounds. The Phoenix rate applies to practically all points on the Arizona Eastern north of Maricopa and to all points on the branch line of the Santa Fe south of Ash Fork and as far west as Parker, Ariz. There is no movement of sugar from California through Phoenix to points beyond taking lower rates.

Complainants admit that the grouping of California sugar-producing points is advantageous, as it gives them the benefit of a wide purchasing market on a uniform rate. They contend, however, that the rates to Phoenix are unreasonable, in comparison with lower rates from the California group to points involving hauls for distances which are greatly in excess of those to Phoenix. In the subjoined statement the revenues per car, per ton-mile, and per car-mile yielded by the rates to Phoenix are compared with revenues produced by certain of the rates cited by complainants. The rates shown include the general increases authorized by us on July 29, 1920.

From—	To—	Distance.	Rate per 100 pounds.	Revenue.		
				Per car.	Per ton-mile.	Per car-mile.
		Miles.			Mills.	Cents.
Los Angeles, Calif.	Phoenix, Ariz.	451	[1]$1.045	$627.00	46.3	139
San Francisco, Calif.	do	800	[1]1.045	627.00	26.1	78.3
Betteravia, Calif.	do	655	[1]1.045	627.00	31.9	95.7
Do	El Paso, Tex.	1,020	[1].965	579.00	18.9	56.7
New Orleans, La.	do	1,192	[2]1.080	388.80	18.1	32.6
San Francisco, Calif.	St. Paul, Minn.	2,154	[1]1.025	615.00	10	28.6
Los Angeles, Calif.	Chicago, Ill.	2,231	1.09525	657.00	9.8	29.4

1. Minimum weight 60,000 pounds.

2. Minimum weight 36,000 pounds.

Defendants take the position that the rates on sugar from California producing points to the central and eastern sections of the [178] country are on a subnormal basis due to the necessity of marketing the California product, which greatly exceeds local consumption, in competition with sugar refined at New Orleans and Atlantic seaboard points; that a normal basis of rates would prevent the movement of California sugar because of the great disparity in distances from the competing refineries to the common markets; and that intermediate main-line points are given the benefit of these extremely low competitive rates. They attempt to justify the present rates to Phoenix on the grounds that the volume of movement is small and that market conditions present at El Paso and the other points cited by complainant are not met with at Phoenix. They argue that we recognized the potency of market competition in Fourth Section Violations in Rates on Sugar, 31 I. C. C., 511, by permitting the maintenance of lower rates on sugar from California to Missouri River points than those contemporaneously in effect to intermediate points on the Rock Island east of Tucumcari, N. Mex., in connection with routing, Southern Pacific to El Paso, El Paso & Southwestern to Tucumcari, Rock Island beyond. In that case we required the Southern Pacific to hold the El Paso rate from California as maximum at intermediate points, and denied the Santa Fe authority to charge lower rates from California to Trinidad, Colo., and points east thereof than it contemporaneously maintained to inter-

mediate points. Accordingly, these carriers reduced the main-line rates in Arizona and New Mexico to the level of the rates to El Paso and Trinidad, respectively.

A partial list of the shipments on which reparation is sought shows that 48 carloads moved during the period June, 1919, to August, 1920, inclusive, 34 being routed via Southern Pacific and 14 via Santa Fe. A statement filed by the defendants shows that during the year 1916, 1917, 1919, and the first six months of 1920, 348 cars aggregating 9,423 tons moved from California points to Arizona via Santa Fe, of which 78 cars aggregating 2,229 tons moved to Phoenix.

From Betteravia, which may be taken as fairly representative of the California group, the present rate to Phoenix yields, for a distance of 655 miles, revenues of $627 per car, 95.7 cents per car-mile, and 31.9 mills per ton-mile upon the basis of the tariff minimum weight of 60,000 pounds. A substantial volume of sugar moves from California to Phoenix in carloads. While, no doubt, relatively lower rates are justified to more distant points where the force of market competition is controlling, nevertheless, Phoenix is entitled to rates, which, measured by present-day standards, are just and reasonable. If, however, the rates to competitive points are remunerative, then clearly the rates to Phoenix are excessive, even after giving due con- [179] sideration to the volume of traffic handled to the points in question, and the character of the haul into Arizona. The rate of 96.5 cents

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from California is carried on the main line of the Southern Pacific for a distance of 400 miles east of Maricopa. The application of the same rate to Phoenix, but 35 miles distant from Maricopa does not appear to be unreasonable. The Southern Pacific and the Arizona Eastern are properly treated as one line in this instance. Pacific Creamery Co. v. S. P. Co., 42 I. C. C., 93, 96.

Complainants contend that the maintenance of rates from California of $1.045 to Phoenix and 96.5 cents to Tucson is unduly prejudicial to Phoenix, to the undue preference and advantage of Tucson. The record shows that Phoenix jobbers sell sugar at several points in territory contiguous to both Phoenix and Tucson, in competition with jobbers located at the latter point. While there is an indication that in some instances the Phoenix jobbers must shrink their profits to compete with Tucson, there is no evidence to show that this results from the difference in rates from California to the two competing points.

Complainants' request for the establishment of through routes and joint rates from San Francisco by way of Phoenix to Maricopa and points east thereof on the lines of the Southern Pacific to and including El Paso is substantially the same as was made in Phoenix Chamber of Commerce v. Director General, 62 I. C. C., 368, and the evidence is identical by reason of the stipulation into this record of the testimony there introduced. In that case we found that the proposed arrangement had not been shown to be necessary or in the public in-

terest and denied the petition. There is no basis for a different finding on this record.

We find that the rates attacked were, are, and for the future will be, unreasonable to the extent that they exceeded, exceed, or may exceed 96.5 cents. There is no evidence of record that complainants made shipments of sugar from California points to Phoenix, and paid and bore charges thereon at rates higher than those herein found reasonable. In the event that such shipments were made, complainants should file statements under rule V of the Rules of Practice, showing the details of such shipments, accompanied by appropriate proof in the form of an affidavit that the shipments were made and that the freight charges were paid and borne by complainants. If defendants object to proof in the form of an affidavit they may request a further hearing with respect to the subject matter thereof.

The prayer for a through route and joint rates from San Francisco by way of Phoenix to Maricopa and points east thereof on the line of the Southern Pacific, to and including El Paso, is denied.

An appropriate order will be entered. [180]

ORDER.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 22d day of June, A. D. 1921.

No. 11532.

Traffic Bureau of the Chamber of Commerce, Phoenex, Ariz.; Hall-Pollock Company, Phoenix, Ariz.; Haas-Baruch & Company, Incorporated, Phoenix, Ariz.; The Melczer Company, Phoenix, Ariz.; and The Arizona Grocery Company, Phoenix, Ariz.

v.

James C. Davis, Director General of Railroads, as Agent; Southern Pacific Company; Arizona Eastern Railroad Company; and The Atchison, Topeka and Santa Fe Railway Company.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and said Division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendants, according as they participate in the transportation be, and they are hereby, notified and required to cease and desist, on or before September 17, 1921, and thereafter to abstain, from publishing, de-

manding, or collecting their present rates for the transportation of sugar in carloads from California points to Phoenix, Ariz.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before September 17, 1921, upon notice to this Commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of sugar in carloads from California points to Phoenix, Ariz., rates which shall not exceed 96.5 cents per 100 pounds.

It is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission, Division 1.

[Seal] GEORGE B. McGINTY,
Secretary. [181]

Thereupon there was offered in evidence by defendants and received as Exhibit "C", a true and correct copy of the report and order of said Commission in Docket 11442, Traffic Bureau, Douglas Chamber of Commerce, etc. v. A. T. & S. F. Ry. Co., et al., 64 I. C. C. 405, in words and figures as follows: [197]

EXHIBIT "C"

7236

Interstate Commerce Commission

No. 11442

TRAFFIC BUREAU OF DOUGLAS CHAMBER OF COMMERCE AND MINES

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

Submitted July 11, 1921. Decided November 3, 1921.

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1. Class and commodity rates from points on lines of defendants in California to Douglas, Ariz., found not unreasonable or unjustly discriminatory.
2. Class and commodity rates from points in California on lines of defendants to Douglas, found unduly prejudicial to the extent that they exceed corresponding rates contemporaneously in effect from the same points of origin to Bisbee, Ariz., and to certain cross-country points on the Southern Pacific in Arizona and New Mexico.
3. Commodity rates from points on lines of defendants in Oregon and Washington, and points basing thereon, to Douglas, applicable via California junctions, found unduly prejudicial, to the extent that they exceed corresponding rates contemporaneously in effect via California junctions from the same points of origin to El Paso, Tex., and Bisbee.

E. R. Raumaker for complainant.

F. C. Tockle for El Paso Chamber of Commerce; Roland Johnston for Traffic Bureau, Chamber of Commerce, Phoenix, Ariz.; and B. D. Woodward for Murray & Layne Company, interveners.

J. L. Stewart, Boyle & Pickett, E. W. Camp, G. H. Baker, Fred H. Wood, Elmer Westlake, and C. W. Durbrow, for defendants.

REPORT OF THE COMMISSION.

Division 4, Commissioners Meyer, Daniels, Eastman, and Potter.

EASTMAN, Commissioner:

No exceptions were filed to the report proposed by the examiner. We have reached conclusions differing but slightly from those which he recommended.

Complainant is an organization of shippers and receivers of freight located at and in the vicinity of Douglas, Ariz. It alleges that the class rates, and commodity rates, except on fresh fruits and vegetables, from points on the lines of defendants in California, [183] Oregon, Washington, Idaho, Montana, Utah, Nevada, and British Columbia to Douglas are unjust, unreasonable, unjustly discriminatory, and unduly prejudicial. The Murray & Layne Company and the Traffic Bureau, Chamber of Commerce, Phoenix, Ariz., intervened on behalf of complainant. Petitions of intervention on behalf of defendants were filed by the El Paso Chamber of Commerce and by the El Paso Sash & Door Company. The latter, however, did not participate in

the hearing. We are asked to prescribe reasonable and nonprejudicial rates for the future. Rates herein are stated in amounts per 100 pounds, and do not include the general increases of 1920.

Complainant's contentions are that the importance of Douglas, as the jobbing and mining center of southern Arizona and New Mexico and the gateway to ore regions in Mexico, together with its location west of El Paso, Tex., entitle it to lower rates than El Paso from points in California; that, being on the main line of the El Paso & Southwestern, its rates should not exceed those maintained to Bisbee, Ariz., a branch-line point near by; that from San Francisco, Los Angeles, and points grouped therewith its rates are unduly high in comparison with the rates to Tucson, Willcox, and Bowie, Ariz., and to Deming, N. Mex.; that from points in Oregon, Washington, Idaho, Montana, and British Columbia, hereinafter referred to as the northwest, its rates should not exceed those in effect to El Paso; that joint rates should be established from all points in California on the Atchison, Topeka & Santa Fe, hereinafter called Santa Fe, to Douglas via Colton, Calif., or Phoenix, Ariz.; and that there are no circumstances or conditions which justify the publication of joint rates to El Paso and not to Douglas.

While the class and commodity rates from points in the northwest were put in issue, complainant stated at the hearing that if commodity rates were established from that territory to Douglas on the El Paso basis, but not to exceed the rates contemporaneously maintained to Bisbee, this phase of the complaint would be satisfied. Accordingly the class rates from the northwest will not be considered.

Douglas is situated in the extreme southeastern part of Arizona near the Mexican border on the main line of the El Paso & Southwestern, 217 miles west of El Paso and 124 miles southeast of Tucson, the western junction of that carrier with the Southern Pacific. It is 22 miles east of Osborn, Ariz., from which point a branch line of the El Paso & Southwestern extends north 7 miles to Bisbee. The Southern Pacific is the short line from Tucson to El Paso. The line [184] of the El Paso & Southwestern is somewhat longer, as it dips down to the Mexican border. Douglas is in competition with Tucson and Bisbee, and with Willcox, Bowie, and other cross-country points on the Southern Pacific, 60 to 80 miles distant by air line, for the trade of the intervening territory.

In 1888 the Arizona & South Eastern was constructed from Bisbee to Fairbank, Ariz., and about 1894 it was extended to Benson, Ariz., where connection was made with the Southern Pacific. Some years later the Southwestern Railroad of Arizona was built from Don Luis, Ariz., to Douglas, thus providing a through route from Benson to Douglas. In 1901 these lines were consolidated under the name of the El Paso & Southwestern, which in 1902 was extended into El Paso. In the same year the right of way was changed in such a way as to make Bisbee a branch-line point.

In 1901 rates between Douglas and California points were made by double combination on Benson and Don Luis. In 1903 joint class and commodity rates were established between points in California and stations on the El Paso & Southwestern, based

on the combination of locals on Fairbank. The class rates were uniformly 15 cents higher to Douglas than to Bisbee. This basis continued until 1913 when the El Paso & Southwestern was extended into Tucson, thus providing a new route for the interchange of traffic with the Southern Pacific, at which time, with a few exceptions, rates applicable from California points to El Paso via the Southern Pacific were met by the El Paso & Southwestern, and held as maxima at Douglas and all other intermediate points, Tucson to El Paso.

While rates from the east are considerably higher to Douglas than to El Paso, rates from California are either the same to both points or slightly lower to Douglas, and certain rates from the northwest are considerably higher to Douglas than to El Paso. Complainant contends that Douglas is entitled to the same advantage on traffic from the west that El Paso has on traffic from the east, particularly in the case of the shorter hauls. While the Murray & Layne Company strongly supports this contention, the El Paso Chamber of Commerce urges that no changes of this character are warranted, since Douglas and El Paso have had practically the same rates from the west for several years, and business has become adjusted to these conditions.

Complainant compares the class rates from San Francisco and Los Angeles, representative California points of origin, to Douglas, with the corresponding rates to Tucson, Willcox, Deming, and El Paso, typical distributing points which compete with Douglas. Complainant's comparisons, together with class rates from the same points of [185] origin to certain other destinations near Douglas, are shown in the subjoined statement:

Haul	Distance	Classes.									
		1	2	3	4	5	A	B	C	D	E
San Francisco and group to—	Miles	Cts.	Cts.	Cts.	Cts.	Cts.	Cts.	Cts.	Cts.	Cts.	Cts.
Tucson, Ariz.	971	237.5	196.5	171.5	142.5	116.5	116.5	95	81.5	75	65
Benson, Ariz.	1,020	269	225	200	167.5	137.5	137.5	114	99	90	76.5
Fairbank, Ariz.	1,038	269	225	200	171.5	141.5	141.5	115	99	90	77.5
Willcox, Ariz.	1,062	269	225	200	181.5	147.5	156.5	122.5	104	94	80
Bowie, Ariz.	1,085	269	225	200	181.5	147.5	159	126.5	104	96.5	81.5
Olga, Ariz.	1,094	269	225	200	181.5	147.5	159	130	104	97.5	82.5
Lordsburg, N. Mex.	1,135	269	225	200	181.5	147.5	159	134	104	100	87.5
Deming, N. Mex.	1,195	269	225	200	181.5	147.5	159	134	104	100	87.5
El Paso, Tex.[1]	1,283	294	250	200	181.5	147.5	159	134	104	100	87.5
Do.[2]	1,312										
Douglas, Ariz.	1,095	294	250	200	181.5	147.5	159	130	104	97.5	82.5
Bisbee, Ariz.	1,080	294	250	200	181.5	147.5	159	126.5	104	95	81.5
Osborn, Ariz.	1,073	294	250	200	181.5	147.5	159	126.5	104	95	80

Haul	Distance	Classes.									
		1	2	3	4	5	A	B	C	D	E
Los Angeles and group to—	Miles	Cts.	Cts.	Cts.	Cts.	Cts.	Cts.	Cts.	Cts.	Cts.	Cts.
Tucson, Ariz.	502	206.5	171.5	152.5	124	104	104	82.5	69	62.5	52.5
Benson, Ariz.	551	237.5	204	181.5	149	125	125	101.5	86.5	77.5	64
Fairbank, Ariz.	570	237.5	204	182.5	152.5	129	129	102.5	86.5	77.5	65
Willcox, Ariz.	593	237.5	204	182.5	167.5	135	144	110	92.5	81.5	67.5
Bowie, Ariz.	617	237.5	204	182.5	167.5	135	146.5	114	94	84	69
Olga, Ariz.	625	237.5	204	182.5	167.5	135	146.5	117.5	95	85	70
Lordsburg, N. Mex.	667	237.5	204	182.5	167.5	135	146.5	124	104	94	75
Deming, N. Mex.	726	237.5	204	182.5	167.5	135	146.5	129	104	94	75
El Paso, Tex.[1]	814	294	250	189	167.5	135	146.5	129	104	94	82.5
Do.[2]	843										
Douglas, Ariz.	626	285	245	189	167.5	135	146.5	117.5	95	85	70
Bisbee, Ariz.	611	275	236.5	189	167.5	135	146.5	114	92.5	82.5	69
Osborn, Ariz.	604	272.5	234	189	167.5	135	146.5	114	92.5	82.5	67.5

[1] Via Southern Pacific.

[2] Via Southern Pacific and El Paso & Southwestern

On traffic to the above points the San Francisco rate is blanketed over an origin territory about 400 miles in length, while the Los Angeles rate covers points within a radius of about 125 miles. Complainant not only contends that the rates to Douglas are too high from all points in these groups, but that greater reductions should be made from points in the eastern portion of the originating territory than from points in the western portion. This extensive grouping of points of origin gives interior points the benefit of many markets in Pacific coast territory. Moreover, any change in the basis to Douglas, such as is suggested, would result almost inevitably in a similar disturbance of the rates to many other points in Arizona and the southwest, which rates are not in issue here. The evidence of complainant as to the desirability of breaking up these origin groups is too slight to warrant findings of such far-reaching importance.

As the above table shows, destination points are also extensively grouped, rates from San Francisco and Los Angeles to El Paso being blanketed back, in many instances, to and beyond Douglas. The distance Los Angeles to Douglas is 74.2 per cent of the distance [186] Los Angeles to El Paso via Southern Pacific, Tucson, El Paso & Southwestern beyond, and 77 per cent of the distance over the direct line of the Southern Pacific, while the class rates from Los Angeles to Douglas range from 84.7 to 100 per cent of the rates to El Paso. From San Francisco the distances to Douglas are 83.5 and 85.4 per cent of the respective distances to El Paso,

while the Douglas rates vary from 94.3 to 100 per cent of the El Paso rates. Complainant insists that the factor of distance should be given more weight in this destination adjustment. Defendants assert that the San Francisco-El Paso rates are depressed by the rates from St. Louis. There is little doubt but that the rates to El Paso are subject to certain competitive influences which do not affect the rates to Douglas.

Class rates from the San Francisco and Los Angeles groups are generally blanketed to points on the line of the Southern Pacific between Benson and Deming, the extent of the blankets varying with the different classes and narrowing as the lower classes are reached. The first five classes are grouped from San Francisco for average distances of about 240 miles, and from Los Angeles for average distances of about 215 miles. For example, from San Francisco the first-class rate is blanketed from Amole, Ariz., to Afton, N. Mex., a distance of 239 miles; from Los Angeles the first-class rate is blanketed from Amole to Carne, N. Mex., a distance of 199 miles. The mean point of the blankets is near Lordsburg, N. Mex., this point being 41 miles farther from the origin territory than is Douglas. From San Francisco, as will be noted from the foregoing table, the rates on classes D and E are higher to Lordsburg than to Douglas, while on the first two classes the reverse is true. The other classes are the same. From Los Angeles classes B, C, D, and E are higher to Lordsburg than to Douglas, while the first three classes are considerably lower. The intermediate

classes, 4, 5, and A, are the same to both destinations. From both San Francisco and Los Angeles the first five classes are blanketed from Willcox to Deming, a distance of 133 miles. From Los Angeles classes 1, 2, and 3 are 47.5, 41, and 6.5 cents higher, respectively, to Douglas than to Lordsburg; and from San Francisco classes 1 and 2 are each 25 cents higher to Douglas. The defendants offered no explanation of these inconsistencies.

In the following statement the differences in the rates from California, Douglas under El Paso, and Los Angeles under San Francisco are compared with similar differences in connection with the rates to Lordsburg: [187]

	Classes.									
	1	2	3	4	5	A	B	C	D	E
From Los Angeles:										
Douglas under El Paso	9	5	0	0	0	0	11.5	9	9	12.5
Lordsburg under El Paso	56.5	46	6.5	0	0	0	5	0	0	7.5
From San Francisco:										
Douglas under El Paso	0	0	0	0	0	0	4	0	2.5	5
Lordsburg under El Paso	25	25	0	0	0	0	0	0	0	0
Los Angeles under San Francisco:										
To Douglas	9	5	11	14	12.5	12.5	12.5	9	12.5	12.5
To Lordsburg	31.5	21	17.5	14	12.5	12.5	10	0	6	12.5

From the above comparisons it will be observed that the spread between the rates to Douglas and the rates to El Paso, where there is any spread, is greatest in the lower classes, which is contrary to accepted principles of rate making. The reverse is true of the Lordsburg rates. These discrepancies are reflected in the differences between the San Francisco and Los Angeles rates to Douglas. The distance to Douglas from San Francisco exceeds that from Los Angeles by 469 miles. To Lordsburg rates from Los Angeles range from 31.5 cents, first class, to nothing at class C under the San Francisco rates. Moreover, to stations on the El Paso & Southwestern, Tucson to Osborn, including Bisbee, the first-class rates from Los Angeles range from 19 to 31.5 cents under the corresponding rates from San Francisco. Defendants urge that rates from northern California to Douglas are affected by water competition between San Francisco and Los Angeles. However, this fact does not explain the inconsistency between the Douglas rates on the three highest classes and corresponding rates to comparable Southern Pacific and El Paso & Southwestern points. Water competition should affect like rates similarly to all points in the same general territory.

Complainant compares the revenues per ton-mile yielded by the first-class rates from San Francisco and Los Angeles to Douglas with earnings under the corresponding rates to Tucson, Willcox, Deming, and El Paso, as follows:

From—	To Tucson.	To Willcox.	To Douglas.	To Deming.	To El Paso.
	Mills	Mills	Mills	Mills	Mills
Los Angeles	82.27	80.10	91.05	65.43	[1]69.75 [2]72.23
San Francisco	48.92	50.66	53.70	45.02	[1]44.82 [2]45.83

1. Via El Paso & Southwestern. 2. Via Southern Pacific.

The distances from California points to Douglas range from 500 to 1,200 miles. The haul to Douglas involves one additional line not [188] required in the movement to cross-country points on the Southern Pacific. Defendants contend that this fact alone is sufficient to warrant the higher basis at Douglas. They do not explain why this fact, if controlling, affects only a few of the higher classes, nor why the rates in some of the lower classes are less to Douglas than to Deming and certain other of the cross-country points. They offered no evidence to show that the added line to Douglas involves an increase in the cost of service over that to comparable Southern Pacific points, and the record discloses no other transportation conditions which would warrant the maintenance of higher rates to Douglas. As said in Coakley v. Director General, 59 I. C. C., 141, 144, "the mere fact that one haul is two-line and another one-line does not in and of itself justify a higher charge for the two-line haul." It is well established that for distances in excess of 500 miles the fact that the service is by two lines is largely negligible. Pacific Creamery Co. v. S. P. Co., 42 I. C. C., 93, 96.

From the facts of record it seems clear that the rates to Douglas on classes 1 and 2 from the San Francisco group and classes 1, 2, and 3 from the Los Angeles group are unduly prejudicial to Douglas, to the undue preference of Willcox, Bowie, Deming, and other competing cross-country points on the Southern Pacific to which the corresponding class rates are blanketed.

Complainant's main contention as to commodity rates is that the location of Douglas, 217 miles west of El Paso, entitles it to rates proportionately lower than are contemporaneously applicable to El Paso. It shows that rates from the east on various commodities, including canned goods, sugar, and soap, are considerably higher to Douglas than to El Paso, and urges that the converse should be true on traffic from the west.

Commodity rates to Douglas are generally the same from both Los Angeles and San Francisco, and in some instances they apply also from Portland, Oreg. Except to points on the El Paso & Southwestern, the blankets of origin on certain commodities extend to Seattle, Tacoma, and other Washington points. The rates in many instances are blanketed, as to points of destination, practically across the country. Rates of 90.5 cents on canned goods and 87.5 cents on canned salmon are blanketed from Gila, Ariz., to the Atlantic seaboard; and the rate of $1.065 on dried fish extends east from Maricopa, Ariz., in similar manner. Rates on canned milk, beans, sugar, and coffee are the same from San Francisco and Los Angeles to Douglas, El Paso,

and beyond. In a few instances commodity rates from San Francisco and Los Angeles are graded to Douglas and other points in the same general territory. [189]

From the numerous comparisons submitted it appears that the commodity rates from California to Douglas, while higher in some instances than those to competing points, are generally the same. As mining is the principal industry of this section, there is a considerable movement of mine timbers and high explosives from California to Bisbee and Douglas. The rate on mine timbers, from Los Angeles is 27 cents to Bisbee and 32.5 cents to Douglas; from San Francisco the rate is 39 cents to Bisbee and 48.5 cents to Douglas. On high explosives the rate is $2.43 from San Francisco to Douglas and $2.365 to Bisbee. Obviously Douglas is at a disadvantage in the distribution of these commodities in competition with Bisbee. Similar adjustments obtain in connection with a few other commodities. The record shows that there are certain commodities, such as salt and rough timbers, which take higher rates from California to Douglas than to cross-country points on the Southern Pacific which compete with Douglas in the intermediate territory.

Defendants state that the rates to all points on the El Paso & Southwestern are made on the lowest combination of locals, the transcontinental rates being held as maxima to avoid fourth section violations, and this, they contend, gives that section better rates than it is rightfully entitled to. They

deny any intention of favoring Bisbee over Douglas, and explain that the rate adjustment to Bisbee was made when it was a main-line point; that when Bisbee became a branch line point, its rates were allowed to remain, in most instances, on the main line basis. They urge that the length of time that the adjustment has been in effect justifies its continuance; that the rates to Bisbee are reasonable and should not be disturbed; and that the rates to Douglas, because of the greater distance, may reasonably be higher.

Traffic from the west destined to Bisbee must be switched out of main-line trains at Osborn, or Don Luis and hauled over a branch line about 7 miles in length, with a maximum grade of 3 per cent. The altitudes of Osborn, Bisbee, and Douglas are 4,675, 5,300, and 3,966 feet, respectively. The haul from Osborn to Douglas is down grade practically all the way. From these facts it is clear that the additional distance of 15 miles, Douglas to Bisbee, does not warrant a difference in the rates from California for distances ranging from 500 to 1,200 miles. And the record discloses no good reason why in those few instances where higher rates apply to Douglas than to Lordsburg and other cross-country points taking the same rates, a like parity should not be brought about.

This same general situation obtains with respect to a number of commodity rates from the northwest, Bisbee, in such cases, being [190] accorded lower rates than Douglas. Furthermore, as joint rates

are published from the northwest on certain commodities to El Paso via the Southern Pacific direct, and are not applicable in connection with the El Paso & Southwestern, it happens in these instances that the rates to Douglas, being on a combination basis, are higher. For example, from Seattle, Tacoma, and other northwestern points to El Paso, Southern Pacific points in Arizona and New Mexico, and points east thereof, the rates on canned goods are 90.5 cents, minimum 60,000 pounds, and $1.065, minimum 40,000 pounds, while the rates to Douglas are 15 cents higher. From Anacortes, Bellingham, Blaine, and other Washington points the rate on canned salmon to El Paso is 87.5 cents. This rate is blanketed from Colton, Calif., to the Atlantic seaboard, being applicable to Tucson, Willcox, Bowie, and other Southern Pacific points which compete with Douglas, while to the latter point the rates are considerably higher, being made on Portland combination. The rates on various other commodities are similarly adjusted. As hereinbefore stated, complainant agreed that as to rates from the northwest its complaint would be satisfied if Douglas were accorded the El Paso basis, but in no case higher than the rates contemporaneously maintained to Bisbee, and we see no reason why, with respect to rates applying via California junctions, this adjustment should not be made.

Many of the commodity rates from the northwest to El Paso and transcontinental territory, however, apply only via Utah and Colorado junctions, and rates so limited do not apply to points west of El

Paso. Complainant contends that all of these rates should be made to apply by way of California junctions and the El Paso & Southwestern, so that Douglas may have the benefit of the El Paso basis. No sufficient reason is shown of record for requiring the establishment of these rates to Douglas via California junctions.

Complainant submitted evidence intended to show that the application from California to Douglas of class rates on certain commodities, higher than commodity rates contemporaneously in force on like traffic from similar points of origin to transcontinental destinations east of Douglas produces violations of the long-and-short-haul clause of the fourth section of the act. Attention is also directed to the fact that the mixtures on certain traffic moving under commodity rates from California points to Douglas in mixed carloads, are restricted as compared with the mixtures permitted on similar traffic moving to points in transcontinental territory east of Douglas. These transcontinental commodity rates are published subject to rule 77 of Tariff Circular 18-A, which is a substantial compliance with the requirements of the fourth section. Du Pont de Nemours & Co. v. Director General, 55 I. C. C. 247. [191]

Complainant compares the rates assailed with rates from Chicago, Kansas City, Denver, and other points to El Paso, from Pacific coast points to Utah common points, and between other points, for the purpose of showing the unreasonableness of the rates to Douglas. These comparisons, however, have little

probative value, as they apply on traffic which in most instances is highly competitive and subject to influences not present in the movement from the Pacific coast to Douglas.

Complainant urges that the minimum weights applicable on certain commodities from California points to Douglas are unreasonable and unduly prejudicial because they are higher than those which apply on the same commodities between California and Denver, between California and Utah common points, and from Chicago, Denver, New Orleans, and other points to El Paso. The minimum weights under attack are also applicable from California to El Paso, Bisbee, and Southern Pacific cross-country points which are in competition with Douglas. No evidence was submitted as to the actual loading or other pertinent factors affecting the minima assailed or those compared; and no showing is made that Douglas is affected adversely by the difference in minimum weights.

The Santa Fe meets the Southern Pacific rates from California to Douglas via its circuitous route through Deming. Complainant contends that through routes should be established from points on the Santa Fe in California to Douglas, either via Santa Fe to Colton, Southern Pacific and El Paso & Southwestern beyond, or via Santa Fe to Phoenix, Arizona Eastern, Southern Pacific, and El Paso & Southwestern beyond. The principal reason advanced to support this request is that the time consumed in the movement via the Deming route is excessive. Complainant submitted a number of

California originating points as representative, all of which have through routes and joint rates in connection with the Southern Pacific. Complainant was unable to name any California points from which joint rates do not apply to Douglas via the Southern Pacific over direct routes. The evidence on this point is meager and indefinite, and fails to support the contention that the through routes from California points to Douglas are not reasonably adequate.

No evidence was submitted to support the allegation under section 2 of the act.

It is clear that there is a closer geographical and economic relationship between Douglas, Bisbee, and cross-country points on the Southern Pacific than is reflected in some of the class and commodity rates from California, and in certain of the commodity rates from the northwest to those points, and that defendants' present rate ad- [192] justment to this extent unduly prejudices Douglas and unduly prefers Bisbee and certain Southern Pacific points. No sufficient evidence has been presented that the rates attacked are unreasonable, or that they are unduly prejudicial by reason of the fact that they are not lower than the corresponding rates to El Paso. This finding is confined to the strict issue before us and to the evidence of record and is not to be understood as direct or indirect approval of the adjustment under which certain commodity rates eastbound are blanketed from Arizona points all the way to the Atlantic seaboard.

Upon the record we find that the rates assailed are not unreasonable or unjustly discriminatory, but that the class rates from points on lines of defendants in California to Douglas are, and for the future will be, unduly prejudicial to the extent that they exceed or may exceed the class rates contemporaneously maintained from the same points of origin to Bisbee, Ariz., and to Lordsburg, N. Mex., and points on the Southern Pacific taking the same rates as Lordsburg; that the commodity rates, except on fresh fruits and vegetables, from said points in California to Douglas are, and for the future will be, unduly prejudicial to the extent that they exceed or may exceed the rates contemporaneously maintained on like commodities from the same points of origin to Bisbee, Ariz., and to Lordsburg, N. Mex., and points on the Southern Pacific taking the same rates as Lordsburg; that commodity rates, except on fresh fruits and vegetables, from points on lines of defendants in Oregon and Washington and points basing thereon, to Douglas, applicable via California junctions, are, and for the future will be, unduly prejudicial, to the extent that they exceed or may exceed the rates contemporaneously maintained on like commodities from the same points of origin to El Paso, Tex., and to Bisbee, Ariz. The foregoing finding should not be construed as covering rates from British Columbia, as no evidence is before us respecting the rates covering that portion of the haul within the United States.

An order will be entered in accordance with these findings. [193]

ORDER.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 4, held at its office in Washington, D. C., on the 3d day of November, A. D. 1921.

No. 11442.

Traffic Bureau of the Douglas, Ariz., Chamber of Commerce and Mines,

v.

The Atchison, Topeka & Santa Fe Railway Company; Camas Prairie Railroad Company; Chicago, Milwaukee & St. Paul Railway Company; El Paso & Southwestern Company; El Paso & Southwestern Railroad Company of Texas; The Galveston, Harrisburg & San Antonio Railway Company; The Great Northern Railway Company; Los Angeles & Salt Lake Railroad Company; Northern Pacific Railway Company; Northwestern Pacific Railroad Company; Oregon Short Line Railroad Company; Oregon Trunk Railway Company; Oregon-Washington Railroad & Navigation Company; Pacific Coast Railroad Company; Rio Grande, El Paso & Santa Fe Railroad Company; Southern Pacific Company; Southern Pacific Company—Atlantic Steamship Lines; Spokane, Portland & Seattle Railway Company; Sunset Railway Company; Tidewater Southern Railway Company; Virginia & Truckee Railway; The Western Pacific Railroad Company; Bay Point & Clayton Rail-

road Company; British Columbia Electric Railway Company, Limited; California Central Railroad Company; California Western Railroad & Navigation Company; Canadian National Railways; The Canadian Pacific Railway Company; Cement, Tolenas & Tidewater Railway; Chelsea Tug & Barge Company; Clatskanie Transportation Company; Coeur d'Alene & Pend d'Oreille Railway Company; Coeur d'Alene & St. Joe Transportation Company; Crows Nest Southern Railway Company; Diamond "O" Navigation Company; Frank Waterhouse & Company; Haekins Transportation Company; Hartford Eastern Railway Company; Inland Empire Railroad Company; Island Belt Steamship Company; J. Kellog Transportation Company; James & Marmont; McCloud River Railroad Company; Nelson & Fort Sheppard Railway Company; Pacific Electric Railway Company; Pacific Northwest Traction Company; Pacific Steamship Company; Portland Railway, Light & Power Company; Puget Sound Navigation Company; Sacramento Northern Railroad; San Diego & Arizona Railway Company; San Francisco-Sacramento Railroad Company; Santa Maria Valley Railroad Company; Sierra Railway Company of California; Skagit River Navigation & Trading Company; Skinner Car Ferry Company; Spokane & Eastern Railway & Power Company; Spokane International Railway Company; Tijuana & Tecati Railway Company; Trona Railway Company; Vancouver-Victoria & Eastern

Railway & Navigation Company; Visalia Electric Railroad Company; Walla Walla Valley Railway [194] Company; Washington, Idaho & Montana Railway Company; Western Transportation Company; Yakima Valley Transportation Company; and Yosemite Valley Railroad Company.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and said Division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before February 21, 1922, and thereafter to abstain, from publishing, demanding, or collecting class rates, and commodity rates, except on fresh fruits and vegetables, from points on the lines of the defendants in California, and commodity rates, except on fresh fruits and vegetables, from points on the lines of the defendants in Oregon and Washington and points basing thereon, to Douglas, Ariz., which shall exceed the class and commodity rates prescribed in the next succeeding paragraphs.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before February 21, 1922, upon no-

tice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply class rates, and commodity rates, except on fresh fruits and vegetables, from points on the lines of the defendants in California to Douglas, Ariz., which shall not exceed the class rates and corresponding commodity rates contemporaneously in effect from the same points of origin to Bisbee, Ariz., Lordsburg, N. Mex., and points on the Southern Pacific taking the same rates as Lordsburg.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby notified and required to establish, on or before February 21, 1922, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply commodity rates, except on fresh fruits and vegetables, from points on the lines of said defendants in Oregon and Washington, and points basing thereon, to Douglas, Ariz., via California junctions, which shall not exceed corresponding commodity rates contemporaneously in effect from the same points of origin and [195] applicable via said California junctions to El Paso, Tex., and Bisbee, Ariz.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission, Division 4.

[Seal] GEORGE B. McGINTY,
Secretary. [196]

Thereupon there was offered in evidence by defendants, and received as Exhibit "D", a true and correct copy of the report and order of said Commission in Docket 13139, Graham etc. Traffic Assn. v. A. E. R. Co., et al., 81 I. C. C. 134, in words and figures, as follows: [211]

EXHIBIT "D"

No. 13139.

GRAHAM & GILA COUNTIES TRAFFIC ASSOCIATION v. ARIZONA EASTERN RAILROAD COMPANY ET AL.

Submitted January 24, 1923. Decided June 27, 1923

Class and commodity rates to points on the Globe division of the Arizona Eastern Railroad from interstate points east and west thereof found not unreasonable but found unduly prejudicial. Undue prejudice ordered removed.

Lloyd F. Jones and F. A. Jones for complainant.

Fred H. Wood, James R. Bell, C. W. Durbrow, Elmer Westlake, J. E. Lyons, George P. Bullard, and Henley C. Booth for defendants.

D. R. Johnson for Arizona Corporation Commission; and O. T. Helpling for Riverside Portland Cement Company, interveners.

REPORT OF THE COMMISSION.

Division 2, Commissioners Daniels, Esch, and Campbell.

Esch, Commissioner:

A report was proposed by the examiner, to which

exceptions were filed by defendants, and oral argument thereon was heard by us.

In Graham & Gila County Traffic Asso. v. A. E. R. R. Co., 40 I. C. C., 573, submitted November 6, 1914, and decided July 7, 1916, the complainant attacked, as unreasonable, unjustly discriminatory, unduly prejudicial, and in violation of the aggregate-of-intermediates clause of the fourth section, commodity rates from points in California and class and commodity rates from eastern transcontinental groups to points in Arizona on the Globe division of the Arizona Eastern Railroad. We declined to consider the allegations of unjust discrimination and undue prejudice because of lack of particularity in the complaint. We further held that the rates in effect were not unreasonable and that the alleged violation of section 4 was without basis, because there was in effect a rule that where the aggregate of the intermediate rates made less than the joint through rate the former should be applied as the lawful rate. The same rule has since been and is now in effect.

The complaint in the instant case, brought by the same complainant, renews the charges made in the former case, also brings in issue the class rates from California and the class and commodity [198] rates from points in Oregon and Washington, and alleges undue preference of El Paso, Tex., Phoenix, Mesa, Florence, Superior, and Flagstaff, Ariz., and other destinations taking relatively lower rates than points on the Globe division. Under the last allegation complainant introduced evidence tending to

show undue preference of Ajo, Sasco, and Nogales, Ariz., and Cananea, Mexico, without objection by defendants, who also introduced evidence intended to disprove any undue preference of those points. Upon oral argument defendants objected to any finding of undue preference of the last-named points as beyond the issues. They do not claim to have been put at any disadvantage by the failure to specifically name these points in the complaint, and the objection is not sustained. The Arizona Corporation Commission intervened in support of the complaint, and the Riverside Portland Cement Company with respect to the rates on cement from California. The alleged violations of sections 2 and 4 of the act are not supported by the evidence and need not be considered further.

The report in the former case sets forth a complete description of the general bases of rates to points on the Globe division as compared with rates to numerous alleged favored points, the relative distances, the industrial, agricultural, traffic, and transportation conditions, and other pertinent matters. The present report, therefore will deal mainly with changes brought about since the decision in the prior case, amplification of certain matters discussed in the former report, in the light of the present comprehensive record, and with the new issue of undue prejudice and preference.

From 1910 to 1920 the population of Arizona increased from 204,354 to 333,273, from 1.86 to 2.91 per square mile, and from 102.46 to 140.17 per mile of railroad. The principal industries of the State

are copper mining and the raising of live stock. Prior to 1920 cotton was also produced extensively and normally is one of the principal products of the State. Other farm or ranch products produced in considerable quantity are alfalfa, wheat, oats, barley, fruit, and dairy products. There are only a few manufactured products. All of the stations on the Arizona Eastern are in Arizona.

At the present time there are about 30,000 acres of irrigated and cultivated land along the Globe division in the Gila Valley. There has been no considerable increase in the irrigated area in this district since 1914. On the other hand, since 1914, the irrigated area in the Salt River Valley, of which Phoenix is the center, has increased from approximately 188,000 acres to 267,400 acres. There is much divergence between the parties as to the nature and relative quantity of traffic handled by the Globe and Phoenix divisions of the Arizona Eastern. The following table compares the tonnage [199] interchanged with the Southern Pacific at Maricopa and Bowie, its junctions with the Phoenix and Globe divisions, respectively, during the four years preceding 1922:

	1918		1919		1920		1921	
	Globe division	Phoenix division	Globe division	Phoenix division	Globe division	Phoenix division	Globe division[1]	Phoenix division
To Southern Pacific.								
Ore and bullion	182,815	183,497	87,236	44,562	85,307	38,151	29,018	7,557
Live stock	7,950	12,802	2,600	11,524	6,079	9,629	5,653	7,123
Agricultural products	17,155	77,414	24,614	93,967	34,095	33,652	22,440	47,431
All other	15,523	32,471	38,019	37,240	2,376	28,252	8,063	20,132
Total	223,443	306,184	152,469	187,293	127,857	109,684	65,174	82,243
From Southern Pacific.								
Oil	202,663	158,903	169,320	97,439	175,727	92,546	58,352	55,888
Forest products	49,842	59,374	30,314	43,925	58,012	52,389	11,405	15,633
Iron and steel	10,048	5,045	5,642	4,678	14,396	8,214	1,858	5,515
Machinery	1,860	4,400	1,369	1,718	2,283	3,087	1,720	565
Coal and Coke	38,628	1,331	26,208	718	38,835	499	11,904	268
Ore and bullion	43,696	11,252	22,693	18,005	14,098	23,298	3,142	2,523
All other	43,355	78,520	58,634	79,504	47,869	119,906	33,294	112,143
Total	390,092	318,825	309,180	245,987	351,220	299,939	121,675	192,535
Ttl. tonnage handled	613,535,	625,009	461,649	433,280	479,077	409,623	186,849	274,778

[1] Figures for January 1 to November 30 only.

The sharp decline in agricultural products delivered to the Southern Pacific at Maricopa in 1920 was due to the depression in the cotton industry that year, the cotton crop prior to that time having comprised a large proportion of the agricultural tonnage from the Salt River Valley.

While it still appears, as stated in the former report, that the Globe division "is dependent chiefly upon products of the mines for its revenue," it is evident that the Phoenix division is also dependent upon mines for a large part of its tonnage. Moreover, while the tonnage of agricultural products and live stock moving over the Globe division is not as large as that over the Phoenix division, nevertheless it is considerable and affords a permanent source of revenue. The foregoing table shows also that the total tonnage hauled does not vary greatly as between the two divisions. The total traffic handled over either division has not shown a steady increase since 1913 but has fluctuated widely from year to year, in which respect it has followed the general trend of traffic on the Southern Pacific in Arizona.

The evidence presented herein confirms what was said in the former report relative to the difficult transportation conditions prevailing on the Globe division. The maximum grade on that division is 3.5 per cent, from Miami to Live Oak, 2.5 miles. Other grades [200] are, from Globe to Pinal, 2.28 miles, 2.3 per cent; from Cutter to Pinal, in the opposite direction, 5.6 miles, 2.2 per cent; and from San Carlos to Bowie, 92.5 miles, a maximum of 1

per cent. The maximum grade on the Phoenix division between Maricopa and Phoenix is 0.49 per cent, from Sacate to Maricopa, 8 miles; on the Buckeye branch of the Phoenix division between Phoenix and Hassayampa, 0.5 per cent for about 16 miles; and on the Phoenix & Eastern Railroad under lease by the Arizona Eastern, between Phoenix and Winkelman, except for about 500 feet through a tunnel, 0.52 per cent. Maximum grades on the main line of the Southern Pacific are, between Aurant, Calif., and Yuma, Ariz., 2 per cent; between Yuma and Tucson, Ariz., 1 per cent; and between Tucson and Rio Grande, N. Mex.-Tex., 1.4 per cent.

From 1913 to 1920, inclusive, the net railway operating income of the Arizona Eastern, including the Phoenix & Eastern, yielded from 1.374 to 8.699 per cent on its book value. In the first 11 months of 1921 it sustained an operating deficit of $65,513.58. The operating ratio for the period from 1913 to November 30, 1921, ranged from 50.01 to 88. On June 30, 1915, the Arizona Eastern and the Phoenix & Eastern combined had a book value of $19,227,648.08, while their tentative valuation as of the same date has been fixed by us at $13,392,214.

From 1913 to 1920, inclusive, the return on the book value of the Southern Pacific ranged from 3.22 to 5.37 per cent, and the operating ratio from 58.87 to 80.63. Pertinent statistics of rail-line operations of the Arizona Eastern, Southern Pacific, and other lines are compared below.

	Freight revenue per mile of road		Revenue ton-miles per mile of road		Operating ratio	
	1919	1920	1919	1920	1919	1920
Arizona Eastern	$7,566.18	$8,128.82	323,259	331,312	77.40	81.11
Southern Pacific:						
Arizona intrastate	24,030.16	24,812.35	2,229,502	1,926,483	70.31	66.09
System	15,926.39	17,678.01	1,217,959	1,249,139	76.22	80.57
Atchison, Topeka & Santa Fe:						
Arizona intrastate	15,081.33	17,185.42	1,247,126	1,324,167	70.11	83.07
System	14,358.80	16,235.97	1,147,410	1,186,479	72.54	82.82
El Paso & Southwestern:						
Arizona Intrastate	7,910.52	7,759.55	576,887	521,887	76.41	82.91
System	9,712.52	10,908.39	770,855	854,294	69.64	72.66
Chicago, Rock Island & Pacific	9,678.99	11,708.31	884,991	988,670	86.95	94.63

The annual rental paid by the Arizona Eastern to the Phoenix & Eastern for the use of the 91.86 miles of track of the latter between Phoenix and Winkelman in 1910 was $35,550.55, and has been increased in each successive year, except one, to and including 1920, when the amount paid was $230,-133.78. [201]

The rates hereinafter mentioned are those in effect at the time of the hearing, January 18, 1922, stated in cents per 100 pounds. Class rates from California points to points on the Globe division are made by combination on Bowie. To Ajo, terminus of the Tucson, Cornelia & Gila Bend Railroad, an independent line extending 44 miles from Gila Bend, Ariz., junction point with the Southern Pacific, joint through class rates are in effect, and

the difference between the rates to Gila Bend and to Ajo is only about 25 per cent of the local rates from and to the same points. To Nogales, on a branch line of the Southern Pacific, 66 miles from Tucson, junction point with the main line, rates on the first three classes are constructed by the use of arbitraries over the junction-point rates, which are materially lower than the local rates from Tucson to Nogales. Rates on other classes are constructed on the full combination. The main-line rates on all classes are extended to Mesa, on the Phoenix & Eastern Railroad, or so-called Hayden branch of the Arizona Eastern, 34 miles from Maricopa.

The situation as to commodity rates from California to points on the Globe division, as compared with rates to El Paso, Phoenix, and Nogales, is adequately set forth at pages 575-576 of the former report. Substantially the same relative situation exists to-day. It is sufficient here to call attention to the fact that the junction-point rates are generally extended to Ajo, Mesa, and Nogales, and on some commodities to Florence, which is 36 miles east of Mesa on the same line. On some commodities the rates are blanketed, not only to all main-line and many branch-line and independent-line points in Arizona, but also to eastern transcontinental Groups J to A, inclusive, so that the rates from California to points on the Atlantic seaboard are lower than to Globe division points in Arizona. For instance, the rate on dried fruits from Los Angeles, Calif., to Ajo, Mesa, Phoenix, and Nogales, to main-line points in Arizona, to El Paso, and to trans-

continental Groups J to A is $1.25, while to Safford, on the Globe division, it is $1.62, to Globe $1.94, and to Miami $1.97. On some commodities, comprising generally those used in the mining industry, the main-line rates or rates considerably lower than the combinations on Bowie have been extended to Globe division points.

On the other hand, defendants show that class and commodity rates from San Francisco, Calif., and Los Angeles to East Ely, Nev., on the Nevada Northern Railway, 140 miles from Cobre, Nev. junction point with the main line of the Southern Pacific from Ogden, Utah, to San Francisco, and to Tonopah, Nev., on the Tonopah & Goldfield Railroad, 71 miles from Hazen, Nev., junction point [202] with the same line of the Southern Pacific, are substantially higher than the junction-point rates. Comparisons between commodity rates from California to East Ely and Globe are discussed at page 578 of the former report. Both the Nevada Northern and the Tonopah & Goldfield are independent lines controlled by mining companies. Their traffic is largely derived from the mines which they serve, and that of the former is relatively light as compared with the Arizona Eastern.

Very little evidence was introduced regarding the rates from points in Oregon and Washington, but it appears that the situation there is similar to that with respect to the rates from California, at least on some commodities.

The situation as to class and commodity rates from eastern transcontinental groups to points on

the Globe division, as compared with those to mainline and branch-line points in Arizona, with rates to branch line points in California, and class rates to Winnemucca, Nev., is fully described in the former report at pages 580 to 586. Evidence presented by complainant in the instant case confirms much of what is there said and need not be reviewed in detail. It will suffice to direct attention to additional matters disclosed by the present record. The spread between the rates to points on the Globe division and other points indicated has, of course, been increased by the percentage increases made on June 25, 1918, and August 26, 1920.

The joint through rates to Globe division points are constructed by adding arbitraries to the joint through rates to Bowie, except on some commodities used in the mining industry. Until June 20, 1921, these arbitraries were generally the same as the local rates from Bowie. On that date a substantial increase was made in the local rates, but the arbitraries were not increased. By schedules filed to become effective May 15, 1922, defendants proposed to increase the arbitraries to a parity with the local rates, but upon protest by the complainant herein, the proposed increased rates were suspended in Investigation and Suspension Docket No. 1555. Subsequently defendants were permitted to cancel the suspended schedules, and the proceeding was discontinued.

Joint through commodity rates apply from eastern groups to Ajo and Sasco, which are generally only slightly higher than the mainline rates of the

Southern Pacific. Sasco is on the Arizona Southern Railroad, an independent short line, extending from Red Rock, Ariz., junction with the main line of the Southern Pacific to Silver Bell, Ariz., 21 miles. Sasco is about 8 miles from Red Rock. From the East commodity rates are generally maintained to Cananea, on the Southern Pacific of Mexico, 20 miles from Naco, Ariz., where that line connects with the El Paso & Southwestern, on a parity with [203] Bowie and other main-line points of the Southern Pacific in Arizona. The distance from Kansas City, Mo., to Cananea is 1,211 miles, as compared with 1,147 miles to Bowie and 1,271 miles to Globe.

The position taken by complainant is that where the rates are graded to points on the main line east and west of Bowie they should be similarly graded for like distances from Bowie to Globe division points, and where blanketed the junction-point rates should be extended to Globe division points not more distant from Bowie than the extent of the blanket from Bowie.

A number of witnesses engaged in business at various points on the Globe division testified as to the severe competition experienced from merchants and jobbers at points on the Phoenix division and on the Atchison, Topeka & Santa Fe, herein called the Santa Fe, who, by reason of their more advantageous freight rates, were able to haul their goods across country by truck and enter the markets at Globe division points. For the same reason such merchants and jobbers have been able to do

business at country points not served by rail lines, which are much nearer to the Globe division.

The effect of water competition upon the rates to Nogales and El Paso is referred to at page 584 of the report in the former case. It does not appear from the present record that any traffic has moved by water into Guaymas, Mexico, and from that point to Nogales for several years.

Defendants show that class rates from Kansas City, St. Louis, Mo., and Chicago, Ill., to East Ely and Tonopah are made by combination on the junction points; that rates from the same origin points to Clifton, Ariz., on a branch of the El Paso & Southwestern, formerly the Arizona & New Mexico Railroad, are generally only slightly less than the full combination on the junction point; and that rates to Paragon, Idaho, on a branch line of the Oregon-Washington Railroad & Navigation Company, 33 miles from Enaville, Idaho, junction point with the main line, are substantially higher than the junction-point rates. Complainant directs attention to numerous branch-line points in Idaho to which the main-line rates are applied. It is conceded that from the East the main-line rates are usually extended to branch-line points in California but defendants maintain that this is a situation that has been brought about through competitive influences beyond their control.

The rates to Cananea, Sasco, and Ajo were established and have been maintained by agreement or understanding between the Southern Pacific and the mining companies operating at those points. It

is said that the rates to Cananea have been held down by potential water competition through the port of Guaymas, and that it has been necessary to accord a favorable basis of rates to that point [204] because the mines located there have experienced great difficulty in keeping in operation. Practically all of the traffic moving to and from Cananea is incident to the mining industry at that point.

The agreement relative to the rates to and from Ajo was entered into prior to the construction of the Tucson, Cornelia & Gila Bend in 1915, and was made in view of the contemplated construction of that line by other routes which would have drawn the traffic away from the Southern Pacific. The relatively low rates accorded that point comprise not only rates on commodities essential to the mining industry but also on practically all class and commodity traffic. Defendants state that the rates to Sasco will probably be canceled, due to the dismantling of the plant at that point.

By understanding with the companies operating mines on the Globe division, joint through rates on mining supplies and products of the mines were originally established and have been maintained to points on that line. Defendants reiterate the explanation contained in the former report of their rate policy on the Globe division, viz:

> * * * that low rates on mining supplies and mining products are necessary to enable the mines at Globe and Miami to compete with other mines. To put it in another way, the

carriers contend that low rates on mining supplies and mining products are essential to the life of the mining community, but that such is not the case with respect to rates on the various other commodities included in the complaint.

At the hearing defendants stated that material reductions were being published, effective not later than April 15, 1922, in the rates on mining supplies from eastern transcontinental groups, which would establish generally a parity of rates thereon as between Globe division points, on the one hand, and Cananea, Ajo, Hayden, Clifton, and other branch-line and independent-line points in Arizona on the other hand. Among the principal articles embraced in this readjustment were cast-iron pipe, iron and steel articles of various kinds, mixing machinery, grinding balls, bolts, nuts, washers, spikes, boiler flues, boiler ends, boiler heads and cables. On forest products from California and Oregon to Arizona, and on petroleum oil from California, one-half of the general increase made on August 26, 1920, was to be removed and a similar parity established as between the points named. The rates on fuel oil from the midcontinent field were also to be reduced. The reductions on mining supplies and on coal and coke are experimental and of a temporary character. The entire increase of August 26, 1920, on coal and coke was removed on March 25, 1922. A reduction of 10 per cent has also been made in the rates on agricultural products.

Defendants, without admitting that the rates assailed are unreasonable or unduly prejudicial, stated

that, if we should find that [205] other rates must be reduced, the maximum reduction that should be required would be to establish joint through class and commodity rates to Globe division points from points east and west, based on the rates to Bowie and a reduction of one-third from the present local rates from Bowie. Complainant contends that such a readjustment would be inadequate and fail to remove the underlying causes of the complaint; that nothing has been shown in this proceeding to justify the charging of 66 2/3 per cent of the local rates to Globe division points and applying the junction-point rates, or rates only slightly higher, to numerous other points similarly situated.

The record in this proceeding shows that transportation conditions are without doubt somewhat more difficult over the Globe division than over the Phoenix division, but it can not be said that that difference is so pronounced as to warrant in itself a continuance of the existing inequalities as between the rates to points on those lines. Except as to Phoenix, defendants have failed to establish any such dissimilarity of conditions or other convincing reasons as to justify the present rate relation. Even as to Phoenix it should be remembered that the Southern Pacific does not in all instances have to meet the rates of the Santa Fe, but, on the contrary, the Santa Fe has to meet the rates of the Southern Pacific from many points of origin, because the latter is the direct and rate-making line.

The situation here presented is in all substantial respects similar to that considered by us in the recent case of State of Idaho ex rel. v. Director Gen-

eral, 66 I. C. C., 330. We there found that the maintenance of blanket commodity rates from and to Nampa, Idaho, main-line junction point on the Oregon Short line, and to Emmett and Boise, Idaho, on the Emmett and Boise branches, respectively, of the same carrier, lower than the rates contemporaneously maintained on like traffic from and to points on the Murphy and Wilder branches, was unduly prejudicial to the latter and unduly preferential of the former to the extent of the difference in such rates. A similar finding was made as to rates that were graded to points on those branches to the extent that the branch-line differentials on the Murphy and Wilder branches exceeded those maintained from and to points on the Emmett and Boise branches for like distances from the main-line junction.

The Southern Pacific owns practically all of the stock of the Arizona Eastern and, although the latter is separately operated, for rate-making purposes it may be considered as a branch line of the Southern Pacific. Smith v. I. C. R. R. Co., 68 I. C. C., 427; Arizona Corporation Commission v. A. E. R. R. Co., supra.

Defendants urge that no competitive relation has been made to appear as between the points considered herein. The record estab- [206] lishes a very definite competition existing as between certain of the points. In this connection attention may be directed to the decision in Intermediate Rate Asso. v. Director General, 61 I. C. C., 226, wherein the same contention was made. In that case we said:

> However, thriving communities, all in the same general section of the country, striving for population, industry, and business growth, may not need elaborate evidence to show that they are entitled to relief if the rates are not properly related.

The fact that rates to certain points are maintained under contract between the carriers and shippers does not affect our authority to require the carriers to desist from violations of the interstate commerce act. Ohio Rates, Fares, and Charges, 64 I. C. C., 493, Cape Girardeau Commercial Club v. I. C. R. R. Co., 51 I. C. C., 105. As in State of Idaho ex rel. v. Director General, supra, the record in the instant case does not support a finding of unreasonableness.

We find that the maintenance of class and commodity rates on interstate traffic from points in California, Oregon, and Washington and from eastern transcontinental groups to Ajo, Mesa, Florence, Sasco, and Nogales, Ariz., and other points on the Arizona Eastern and on branch lines of the Southern Pacific in Arizona, except competitive points located on lines of different carriers, and to Cananea, Mexico, in so far as the transportation takes place within the United States, not higher than the rates to the junction points with the main line of the Southern Pacific, and the refusal to maintain rates on a similar basis to Amster, Solomon, Safford, Thatcher, Pima, Fort Thomas, Globe, and Miami, Ariz., on the Globe division of the Arizona Eastern, is unduly prejudicial to the latter

points and unduly preferential of the former points to the extent that the rates to the Globe division points exceed the rates to the junction point.

We further find that the maintenance of class and commodity rates on interstate traffic, the rates on which are on a graded or mileage basis, from the points of origin described in the last paragraph to the said points on the Globe division higher for like distances than are contemporaneously maintained to Ajo, Mesa, Florence, Sasco, and Nogales, Ariz., and other points on the Arizona Eastern and on branch lines of the Southern Pacific in Arizona, and to Cananea, Mexico, in so far as the transportation takes place within the United States, is unduly prejudicial to the former points and unduly preferential of the latter points to the extent that the rates to the Globe division points exceed those contemporaneously maintained on like traffic to the other destination points described for like distances from the main-line junction. [207]

In the case of rates constructed according to the latter method, joint through rates should be established to all the branch-line and independent-line points involved based on the rates to the main-line junction point and a uniform percentage of the local rates beyond.

The Tucson, Cornelia & Gila Bend and the Arizona Southern are not parties defendant, and no order can, therefore, be issued against them, but it appears that the Southern Pacific controls the rates to Ajo and Sasco and that it can remove the undue prejudice and preference as to those points.

An appropriate order will be entered. [208]

ORDER.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D. C., on the 27th day of June, A. D. 1923.

No. 13139.

Graham & Gila Counties Traffic Association

v.

Arizona Eastern Railroad Company; The Atchison, Topeka & Santa Fe Railway Company; The Baltimore & Ohio Railroad Company; Boston & Albany Railroad Company and The New York Central Railroad Company, Lessee; The Chicago, Rock Island & Pacific Railway Company; The Chicago, Rock Island & Gulf Railway Company; The Colorado & Southern Railway Company; El Paso & Northeastern Railroad Company; El Paso & Southwestern Railroad Company; El Paso & Southwestern Company; El Paso & Southwestern Railroad Company of Texas; The Fort Worth & Denver City Railway Company; The Galveston, Harrisburg & San Antonio Railway Company; Louisville & Nashville Railroad Company; Morgan's Louisiana & Texas Railroad & Steamship Company; The New York Central Railroad Company; The Pennsylvania Railroad Company; Southern Pacific Company; Texas & New Orleans Railroad Company; and The Texas & Pacific Railway Company and J. L. Lancaster and Charles L. Wallace, Receivers.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and said division having found in said report that the maintenance of class and commodity rates on interstate traffic from points in California, Oregon, and Washington and from eastern transcontinental groups to Ajo, Mesa, Florence, Sasco, and Nogales, Ariz., and other points on the Arizona Eastern and on branch lines of the Southern Pacific in Arizona, except competitive points located on lines of different carriers, and to Cananea, Mexico, in so far as the transportation takes place within the United States, not higher than the rates to the junction points with the main line of the Southern Pacific, and the refusal to maintain rates on a similar basis to Amster, Solomon, Thatcher, Pima, Fort Thomas, Globe, and Miami, Ariz., on the Globe division of the Arizona Eastern, is unduly prejudicial to the latter points and [209] unduly preferential of the former points to the extent that the rates to the Globe division points exceed the rates to the junction point; and that the maintenance of class and commodity rates on interstate traffic, the rates on which are on a graded basis, from the said origin points and groups to the said points on the Globe division higher for like distances than are contemporaneously maintained to Ajo, Mesa, Florence, Sasco, and Nogales, and other points on the Arizona Eastern

and on branch lines of the Southern Pacific in Arizona, and to Cananea, in so far as the transportation takes place within the United States, is unduly prejudicial to the former points and unduly preferential of the latter points to the extent that the rates to the Globe division points exceed those contemporaneously maintained on like traffic to the other destination points described for like distances from the main-line junction:

It is ordered, That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before October 11, 1923, and thereafter to abstain, from practicing such undue prejudice and preference.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before October 11, 1923, upon notice to this commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply rates which will prevent and avoid the aforesaid undue prejudice and preference.

And it is further ordered, That this order shall continue in force until the further order of the commission.

By the commission, division 2.

[Seal] GEORGE B. McGINTY,
Secretary. [210]

Thereupon, defendants offered further testimony as follows:

TESTIMONY OF J. L. FIELDING:

Direct Examination:

(The qualifications of Mr. Fielding were admitted by counsel for plaintiffs.)

"I am Assistant General Freight Agent of Southern Pacific Company, and have been in its employ for about twelve years. For two years I was at Tucson, Arizona, as Chief Rate Clerk, in the Freight Traffic Department. I was Assistant General Freight Agent at El Paso for two years, following 1924, and have been Assistant General Freight Agent at San Francisco since 1926. For the past six years my work has been exclusively the preparation of exhibits and testimony for introduction in cases before courts and commissions; and prior to 1926 I was engaged in similar work for a substantial part of my time. I have, in my possession or available to me at my office, tariffs which show the rates on sugar, in carloads from California points to destinations in Arizona, including Tucson, heretofore and now in effect. These tariffs are printed counterparts of tariffs lawfully on file with the Interstate Commerce Commission. I have prepared certain statements for presentation in these cases, from those tariffs, and have checked those statements against the sources of information shown thereon, and have determined that they are true and correct to the best of my knowledge and belief."

(Testimony of J. L. Fielding.)

Thereupon, there was offered in evidence, through said Witness Fielding, the statements referred to by the witness; which statements were marked, identified and received as Defendants' Exhibits "E" and "F", and are in words and figures as follows: [212]

#L-738-Phx
#L-844-Phx

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Defendants' Exhibit No. E

STATEMENT SHOWING COMPLETE CHRONOLOGICAL HISTORY OF CARLOAD RATES ON SUGAR FROM NORTHERN CALIFORNIA SHIPPING POINTS VIZ: CROCKETT AND SAN FRANCISCO, CALIF., TO TUCSON, ARIZONA, DURING THE PERIOD APRIL 15th, 1914 TO AND INCLUDING JUNE 11th, 1928.

UNITED STATES DISTRICT COURT (ARIZONA)
Case No.
Exhibit No.
Sheet No.

LINE	EFFECTIVE DATE OF CHANGE IN RATES	Rate in cents per 100 lbs.	Minimum Weight (Lbs)	Rate in cents per 100 lbs.	Minimum Weight (lbs)	TARIFF REFERENCE ISSUED BY	TARIFF NUMBER	ICC NUMBER	REMARKS
1.	April 15, 1914	70	36000	-	-	Southern Pacific Co.	612-B	3632	
2.	November 15, 1914			55	60000	" " "	"	"	Voluntary reduction in rate.
3.	April 27, 1915	60	36000			" " "	"	"	Voluntary reduction in rate.
4.	May 25, 1915	60	36000	55	60000	" " "	"	"	No change involved - Rates approved as reasonable in ICC 6306 (34 ICC 158) decided May 25, 1915
5.	June 25, 1918	75	36000	69	60000	" " "	"	"	25% increase in rates under Director General's Order No.28
6.	November 25, 1919	82	36000	77	60000	" " "	612-C	4077	22% increase MX 3203, superseding General Order No.28.
7.	February 29, 1920	-	-	77	60000	" " "	"	"	82% rate, 36000 lbs. cancelled MX 15797.
8.	August 26, 1920	-	-	96½	60000	" " "	"	"	25% increase in rates "Ex Parte 74" (58 ICC 220).
9.	July 27, 1921	-	-	96	60000	" " "	612-D	4172	Voluntary reduction in rate.
10.	July 1, 1922	-	-	86½	60000	" " "	"	"	10% voluntary reduction "Reduced Rates 1922"(68 ICC 676).
11.	January 11, 1924	-	-	84	60000	" " "	612-F	4442	Voluntary reduction in rate.
12.	October 27, 1925	-	-	75	60000	" " "	612-G	4499	Rate to Bowie, prescribed in ICC 14140 (101 ICC 667), applied also at Tucson, directly intermediate point.
13.	June 11, 1928	-	-	77	60000	F. W. Gomph, Agent	26-B	885	Rate prescribed in ICC16742 (140 ICC 171).

STATEMENT SHOWING COMPLETE CHRONOLOGICAL HISTORY OF CARLOAD RATES ON SUGAR FROM SOUTHERN CALIFORNIA SHIPPING POINTS VIZ: BETTERAVIA, AND OXNARD, CALIFORNIA TO TUCSON, ARIZONA, DURING PERIOD APRIL 15th, 1914 TO AND INCLUDING JUNE 11th, 1928.

UNITED STATES DISTRICT COURT
(Arizona) Case No. L-738/L-844
EXHIBIT NO. E
SHEET NO. 2

LINE	EFFECTIVE DATE OF CHANGE IN RATES	Rate in cents per 100 Lbs.	Minimum Weight Pounds	Rate in cents per 100	MINIMUM WEIGHT POUNDS	TARIFF REFERENCE ISSUED BY	TARIFF NUMBER	ICC NUMBER	REMARKS
1.	April 15, 1914	60	36000	-	-	Southern Pacific Co.	612-B	3632	Rate prescribed in ICC 5120 (29 ICC 103) decided January 6, 1914.
2.	November 15, 1914			55	60000	" " "	"	"	Voluntary reduction in rate.
3.	May 25, 1915	60	36000	55	60000	" " "	"	"	No change involved. Rates approved as reasonable in ICC 6306 (34 ICC 158) decided May 25, 1914.
4.	June 25, 1918	75	36000	69	60000	" " "	"	"	25% increase in rates under General Order No.28.
5.	November 25, 1919	82	36000	77	60000	" " "	612-C	4077	22% increase ~~No. 3608~~ superseding ~~General Order~~ No. 28.
6.	February 29, 1920	-	-	77	60000	" " "	"	"	82% rate, 36000 lbs. cancelled; FRA 15797
7.	August 26, 1920	-	-	96½	60000	" " "	"	"	25% increase "Ex Parte 74" (56 ICC 220).
8.	July 27, 1921	-	-	96	60000	" " "	612-D	4172	Voluntary reduction in rate.
9.	July 1, 1922	-	-	86½	60000	" " "	"	"	10% voluntary reduction "Reduced Rates 1922" (68 ICC 676).
10.	January 11, 1924	-	-	84	60000	" " "	612-F	4442	Voluntary reduction in rate.
11.	October 27, 1925	-	-	75	60000	" " "	612-G	4499	Rate to Bowie, prescribed in ICC 14140 (101 ICC 667), applied also at Tucson, directly intermediate.
12.	June 11, 1928	-	-	65	60000	W. F. Gomph, Agent	26-H	835	Rate prescribed in ICC 16742 (140 ICC 171).

#L-738-Phx.
#L-844-Phx.
Defendant's Exhibit

UNITED STATES DISTRICT COURT (ARIZONA) No. F
Case No
Exhibit
Sheet No. 1

STATEMENT SHOWING RATES ASSESSED ON CARLOAD SHIPMENTS OF SUGAR FROM NORTHERN CALIFORNIA POINTS VIZ: SAN FRANCISCO AND CROCKETT, CALIF., TO TUCSON, ARIZONA, AND EARNINGS THEREUNDER; RATES WHICH THE INTERSTATE COMMERCE COMMISSION DECLARED REASONABLE FOR REPARATION PURPOSES ON SAID SHIPMENTS AND EARNINGS THEREUNDER, COMPARED WITH RATES PRESCRIBED AND/OR APPROVED AS REASONABLE ON SUGAR BY THE INTERSTATE COMMERCE COMMISSION IN DECISIONS CITED, AND EARNINGS THEREUNDER.

LINE	FROM	TO	MILES	ROUTE	RATES ASSESSED: Rate in cents per 100 lbs.	RATES ASSESSED: Revenue Per Ton Mile (Mills)	RATES WHICH INTERSTATE COMMERCE COMMISSION DECLARED REASONABLE FOR REPARATION PURPOSES: Rate in cents per 100 lbs.	RATES WHICH INTERSTATE COMMERCE COMMISSION DECLARED REASONABLE FOR REPARATION PURPOSES: Revenue Per Ton Mile (Mills)
	Rate during period July 1, 1922 to January 10, 1924.							
1.	San Francisco, Cal.	Tucson, Ariz.	908 a:	A	86½	19.1	77	16.9
2.	Crockett, "	" "	889 a:	A	86½	19.6	77	17.3
3.	San Francisco, Cal.	Tucson, Ariz.	970 b:	B	86½	17.6	77	15.8
4.	Crockett, "	" "	955 b:	B	86½	18.1	77	16.1
	Rate during period January 11, 1924 to October 26, 1925.							
5.	San Francisco, Cal.	Tucson, Ariz.	908 a:	A	84	18.5	77	16.9
6.	Crockett, "	" "	889 a:	A	84	18.8	77	17.3
7.	San Francisco, Cal.	Tucson, Ariz.	970 b:	B	84	17.3	77	15.8
8.	Crockett, "	" "	955 b:	B	84	17.6	77	16.1
	- C O M P A R I S O N S -							
LINE	FROM	TO	MILES	ROUTE	Rate in cents per 100 lbs.	Revenue Per Ton Mile (Mills)	REMARKS	
9.	San Francisco, Cal.	Phoenix, Ariz.	787 a:	C	96½	24.5	Rate prescribed in ICC 11532 (62 ICC 412) decided	
10.	Crockett, "	" "	768 a:	C	96½	25.1	June 22, 1921	
11.	San Francisco, Cal.	Phoenix, Ariz.	919 b:	B	96½	21.0	do	
12.	Crockett, "	" "	904 b:	B	96½	21.3	do	
13.	San Francisco, Cal.	Globo, Ariz.	1145 a:	A	159 c	27.7	Rate in effect on January 18, 1922, approved as	
14.	Crockett, "	" "	1126 a:	A	159 c	28.2	reasonable in ICC 13139 (81 ICC 134) decided	
15.	San Francisco, Cal.	Globe, Ariz.	1207 b:	B	159 c	26.3	June 27, 1923.	
16.	Crockett, "	" "	1192 b:	B	159 c	26.6	do	
17.	San Francisco, Cal.	Safford, Ariz.	1061 a:	A	129 c	24.3	do	
18.	Crockett, "	" "	1042 a:	A	129 c	24.7	do	
19.	San Francisco, Cal.	Safford, Ariz.	1123 b:	B	129 c	22.9	do	
20.	Crockett, "	" "	1108 b:	B	129 c	23.3	do	
21.	San Francisco, Cal.	Douglas, Ariz.	1031 a:	A	96½	18.7	Rate complained of as unreasonable in ICC Docket	
22.	Crockett, "	" "	1012 a:	A	96½	19.0	11442 (64 ICC 405) decided November 3, 1921 and	
23.	San Francisco, Cal.	Douglas, Ariz.	1093 b:	B	96½	17.6	approved as reasonable in said proceeding.	
24.	Crockett, "	" "	1078 b:	B	96½	17.9		

(a) Shortest direct mileage - (b) Mileage via usual and customary route of movement. (c) Basis Comb. 96 cents plus 33 cents to Globe, 33¢ to Safford.

ROUTES: A - S...Co. - Mojave, Cal. - A.T.&S.F. - Phoenix, Ariz. - S.P.Co. B - Southern Pacific Co. direct.
C - Southern Pacific Co. - Mojave, Cal. - ...A.T.&S.F.Ry.Co.

STATEMENT SHOWING RATES ASSESSED ON CARLOAD SHIPMENTS OF SUGAR FROM SOUTHERN CALIFORNIA POINTS VIZ: BETTERAVIA AND OXNARD, CALIF., TO TUCSON, ARIZONA, AND EARNINGS THEREUNDER; RATES WHICH THE INTERSTATE COMMERCE COMMISSION DECLARED REASONABLE FOR REPARATION PURPOSES ON SAID SHIPMENTS AND EARNINGS THEREUNDER COMPARED WITH RATES PRESCRIBED AND/OR APPROVED AS REASONABLE ON SUGAR BY THE INTERSTATE COMMERCE COMMISSION IN DECISIONS CITED, AND EARNINGS THEREUNDER.

UNITED STATES DISTRICT COURT
(ARIZONA)
Case No. L-736; L-844
Exhibit No. F
Sheet No. 2

LINE	FROM	TO	MILES	ROUTE	RATES ASSESSED: Rate in cents per 100 lbs.	RATES ASSESSED: Revenue Per Ton Mile (Mills)	RATES WHICH INTERSTATE COMMERCE COMMISSION DECLARED REASONABLE FOR REPARATION PURPOSES: Rate in cents per 100 lbs.	RATES WHICH INTERSTATE COMMERCE COMMISSION DECLARED REASONABLE FOR REPARATION PURPOSES: Revenue Per Ton Mile (Mills)
			Rate during period July 1, 1922 to January 10, 1924					
1.	Betteravia, Calif.	Tucson, Ariz.	703	A	86½	24.6	73	20.8
2.	Oxnard, "	" "	567	B	86½	30.5	73	25.9
			Rate during period January 11, 1924 to October 26, 1925					
3.	Betteravia, Calif.	Tucson, Ariz.	703	A	84	23.8	73	20.8
4.	Oxnard, "	" "	567	B	84	29.6	73	25.9
			Rate during period October 27, 1925 to June 10, 1928					
5.	Betteravia, Calif.	Tucson, Ariz.	703	A	75	21.3	73	20.8
6.	Oxnard, "	" "	567	B	75	26.5	73	25.9
			- C O M P A R I S O N S -					
7.	Betteravia, Calif.	Phoenix, Ariz.	652	C	96½	29.8	Rate prescribed in ICC 11532 (62 ICC 142)	
8.	Oxnard, "	" "	516	D	96½	37.4	decided June 22, 1922.	
9.	Betteravia, Calif.	Globe, Ariz.	940	A	159 a	33.8	Rate in effect on January 10, 1922, approved as	
10.	Oxnard, "	" "	804	B	159 a	39.6	reasonable in ICC 13139 (81 ICC 134) decided	
							June 27, 1923	
11.	Betteravia, Calif.	Safford, Ariz.	856	A	129 a	30.1	do	
12.	Oxnard, "	" "	720	B	129 a	35.8		
13.	Betteravia, Calif.	Douglas, Ariz.	826	A	96½	23.4	Rate complained of as unreasonable in ICC Docket	
14.	Oxnard, "	" "	690	B	96½	28.0	11442 (64 ICC 405) decided November 3, 1921,	
							and approved as reasonable in said proceeding.	

(a) - Bowie, Ariz., combination 96 cents to Bowie plus 63 cents to Globe and 33 cents to Safford, Arizona.

ROUTES: A- Santa Maria Valley Jct. - Guadalupe, Cal. - Southern Pacific Company.
B- Southern Pacific Company direct.
C- Santa Maria Valley Jct. - Guadalupe, Cal. - Southern Pacific Company via Maricopa, Arizona.
D- Southern Pacific Company via Maricopa, Arizona.

(Testimony of J. L. Fielding.)

Thereupon, it was stipulated and agreed, by and between counsel for the plaintiffs and defendants, that pursuant to the Federal Control Act the President of the United States, acting through the Director-General of Railroads as his Agent, assumed possession, control and operation of the railroad properties of the defendants on or about December 29, 1917, and continued in such possession and control to and including February 29, 1920, and that during said period the Director-General was the active head of the United States Railroad Administration.

Thereupon, Witness Fielding testified further as follows:

"As shown on Exhibit "E", the rates in effect prior to June 25, 1918, were increased 22 cents on November 25, 1919, in place of the 25 per cent increase which had been made on June 25, 1918, under General Order No. 28 of the Director-General. This was done pursuant to Freight Rate Authority No. 8016 of the Director-General, and as provided in General Order No. 28 itself. General Order No. 28 provided for a 22-cent increase in rates from points in California to points taking Missouri River rates, and other points (including Tucson, Arizona) related thereto, applicable to carload rates on sugar."

Thereupon, there was offered in evidence through said Witness Fielding, and received as Defendants' Exhibit "G", a true and correct copy of Freight

(Testimony of J. L. Fielding.)

Rate Authority No. 8016 of the Director-General of Railroads, in words and figures as follows: [217]

EXHIBIT "G"—No. L-738

UNITED STATES RAILROAD ADMINISTRATION
Director General of Railroads
Division of Traffic—Western Territory
Transportation Building
608 South Dearborn Street
Room 1909
Chicago, Illinois
E. B. Boyd, Secretary
J. G. Morrison, Ass't. Secretary
Western Freight Traffic Committee

A. C. Johnson, Chairman, F. B. Houghton, S. H. Johnson, H. C. Barlow, Seth Mann, G. S. Maxwell.

Dockets Nos. 1990 & 2479 (F.R.A. 8016)

Chicago, Ill., May 27, 1919.

To the Chairmen, District Committees, and Freight Traffic Officers of Railroads under Federal Control, Western Territory.

RATE ADVICE NO. 3030

(Cancels Rate Advices Nos. 31 and 896)

CORRECTION OF CLERICAL OR TYPOGRAPHICAL ERRORS.

Freight Rate Authority No. 8016 dated May 16, 1919, has been issued by the Director of Traffic, reading as follows:

This will authorize publication of tariff changes

(Testimony of J. L. Fielding.)

to correct clerical or typographical errors under the following conditions:

1. If in amending tariffs to comply with General Order No. 28, Circulars of the Division of Traffic, or under Freight Rate Authorities, issued by the Director, Division of Traffic, there was an error which resulted in establishing rates, charges, regulations or practices different from those prescribed in said Order, Circulars or Authorities, correction may be made to bring about compliance with said Order, Circulars or Authorities.

2. If after rates, charges, regulations or practices have once been correctly published under General Order No. 28, Circulars of the Division of Traffic, or a Freight Rate Authority, and in a subsequent reissue of supplements or tariffs there was an error which resulted in establishing rates, charges, regulations or practices different from those authorized in such Order, Circulars or Authorities, correction may be made to restore them to the basis as authorized.

Tariffs issued under this Freight Rate Authority shall show reference both to it and to the Order, Circular or Freight Rate Authority which authorized the rates, charges, regulations or practices as corrected.

Tariff changes made under this Freight Rate Authority may be made effective on one day's notice if they effect reductions; if they bring about advances they may also be made on one day's notice, provided they can be made effective on the same date as the item to be corrected, otherwise

(Testimony of J. L. Fielding.)

they must be made effective on thirty day's notice.

This cancels Freight Rate Authorities Nos. 154 and 2769.

Please be governed accordingly.

A. C. JOHNSON,
Chairman. [218]

A-HJL

Thereupon, Witness Fielding testified further as follows:

"I have in my files original correspondence which shows how the changes authorized by Freight Rate Authority 8016 were made to apply to the particular rates here involved. This consists of a letter written by the Chairman of the San Francisco District Freight Traffic Committee on the United States Railroad Administration, addressed to various Traffic Officers, under date of August 15, 1919."

Thereupon, there was offered and received in evidence as Defendants' Exhibit "H", a true and correct copy of said original letter of August 15, 1919, from the Chairman of the San Francisco District Freight Traffic Committee of the United States Railroad Administration, referred to in the oral testimony of the witness, in words and figures, as follows: [220]

(Testimony of J. L. Fielding.)

EXHIBIT "H"—L-738

UNITED STATES RAILROAD ADMINISTRATION

J. T. S. Aug. 16, 1919

Director General of Railroads
Division of Traffic—Western Territory
64 Pine Street
Room 404
San Francisco, Cal.

San Francisco District Freight Traffic Committee
W. G. Barnwell, Chairman, G. W. Luce, H. K. Faye, S. H. Love, F. P. Gregson, John S. Willis.
F. W. Gomph, Secretary

August 15, 1919.
File No. RA 2068-A-4

SUBJECT: Increase in the Rate on Sugar, carloads, from California Points to Albuquerque, New Mexico, and El Paso, Texas.

Mr. T. A. Graham, A.F.T.M., Southern Pacific R.R., San Francisco, Cal.

Mr. W. G. Barnwell, A.F.T.M., A. T. & S. F. R. R., San Francisco, Cal.

Mr. H. K. Faye, G.F.A., Western Pacific R. R., San Francisco, Cal.

Mr. T. M. Sloan, F. G. A., L. A. & S. L. R. R., Los Angeles, Cal.

Gentlemen:

Referring to Mr. Graham's letter of July 18th, file 1—N—6053-B-Cal-NM, relative to the proper increase to be made in the rates on Sugar, carloads,

(Testimony of J. L. Fielding.)

from California points to points in Arizona, New Mexico, Nevada and Utah, by authority of that portion of General Order 28 which reads: "from points in California and Oregon to points taking Missouri River rates and points related thereto, under the Commission's Fourth Section order, increased 22 cents per 100 pounds". In order to determine just what was meant by the words "and points related thereto under the Commission's Fourth Section order" the Committee wired Director Chambers, who replied on August 12th as follows:

"In Item 6 of Sugar paragraph in General Order 28 our reference to Commission's Fourth Section orders had in mind the fact that in the Commission's Fourth Section orders covering Eastbound Sugar to Missouri River the Commission prescribed that via certain routes the Missouri River or Colorado rates should be held as maximum while via other routes they prescribed that the rates might be ten cents less than to the Missouri River and it was to those points which were held down by the Missouri River rate under these Fourth Section orders that item 6 prescribes a 22 cent increase. Note item 6 also provides for 22 cent increase to points taking Missouri River rates so if the rates to the destinations in question were prior to June 25th either the same as the Missouri River rates or held down by the Commission's order in the Missouri River case like the 10 cent higher basis then the advance should be 22 cents, otherwise 25%." [221]

(Testimony of J. L. Fielding.)

#2—Joint letter to Messrs. Graham, Barnwell, Faye and Sloan—RA 2068-A-4.

It would appear, therefore, that where rates to points west of the western boundary line of Group J territory published in tariffs of individual line or Bureau issue are the same as the rate to Colorado or Missouri River by reason of the application of those rates as maximum at intermediate points, such rates should be increased 22 cents per 100 lbs.

Further, that *were* rates to branch line points or to points on connecting lines are made by using said maximum rates to the junction, plus locals or arbitraries beyond the junction, those rates should be increased on the basis of 22 cents per 100 lbs. to the junction point and the local or arbitraries beyond the junction point, increased 25%, should be added thereto.

Attention is directed to the rates published in Agent Gomph's Tariff No. 23 Series to points on the Oregon Short Line north of Ogden, Utah, where rates may have been constructed on an arbitrary basis without regard to the rate to Ogden but with regard to the rates from Missouri River to O.S.L. points. A check should be made of those rates and if it is found that any of them are constructed on such an arbitrary basis they should be increased 25%. Interested carriers are requested to look into this feature of that tariff and arrange to give Agent Gomph specific instructions as to the changes that should be made in those rates.

(Testimony of J. L. Fielding.)

Where rates have been published on basis of a 25% increase but which should have been increased 22 cents per 100 lbs., Freight Rate Authority No. 8016 of May 16th issued for the purpose of permitting corrections in clerical errors is sufficient authority to proceed. No additional Freight Rate Authority is necessary to cover the reissuance of rates which have not already been transposed to the General Order 28 basis.

Yours truly,

W. G. BARNWELL.

CC to Messrs.:

W. C. Barnes
E. J. Fenchurch
J. A. Reeves
Fred Wild, Jr.
F. W. Gomph [223]

Thereupon, WITNESS FIELDING testified further as follows:

Cross Examination:

"General Order No. 28, issued by the Director-General, was interpreted as requiring a 25 per cent general increase in the rates on sugar from California points. This construction was in error, as the order provided a specific increase of 22 cents. Freight Rate Authority No. 8016 contained the authority of the Director-General to correct rates erroneously increased 25 per cent, by publication of the changes on one day's notice. This authority

(Testimony of J. L. Fielding.)

covered the rates to Arizona points, including Tucson, because those rates were related to rates from California points to the Missouri River, under Fourth Section authority. In fact, the rates to Tucson, prior to 1918, were the same as the rates to the Missouri River.

A rate of 55 cents became effective from California points to Tucson, subject to a carload minimum of 60,000 pounds, on November 15, 1914. This was a voluntary reduction, at the request of the shippers. At that time the carriers had Fourth-Section relief. The 55-cent rate voluntarily established to Tucson represented a reduction at the request of the shippers, and not because of a desire to publish that rate to Chicago or to points in Colorado. The only reason, to my knowledge, for the voluntary reduction to 55 cents was the desire expressed by the shippers' representatives. So far as I know, the reductions to Arizona were the only ones made at that time. As my rate-history (Exhibit "E") shows, the 55-cent rate to Tucson was approved by the Commission in Docket 6806. To that was added a 22-cent flat increase, made by the Director-General under General Order 28 and Freight Rate Authority 8016, resulting in a rate of 77 cents. A 25 per-cent increase was made pursuant to Ex Parte 74, 58 I. C. C. 220, which added 19½ cents, and resulted in a rate of 96½ cents on August 26, 1920. The increase last mentioned was a general increase of all rates throughout the United

(Testimony of J. L. Fielding.)

States. On June 27, 1921, the carriers voluntarily reduced [225] the rate to 96 cents. In 1922, following Reduced Rates 1922, 68 I. C. C. 676, the rate was further reduced 9½ cents, or to 86½ cents. This was a general 10 per cent reduction throughout the United States. On February 25, 1925, as a result of the Second Phoenix Case, 95 I. C. C. 244, the rate to Phoenix was reduced to 71 cents. The rate to Tucson became 84 cents on January 11, 1924, and was further reduced on October 27, 1925, when the rates to Bowie were reduced as a result of the Solomon-Wickersham Case, 101 I. C. C. 667. The Commission specifically approved the rate to Tucson in Docket 6806 on May 1, 1915, 34 I. C. C. 158. I do not know of any decision after that date, and until Docket 16742, which dealt specifically with the rate to Tucson.

Until November 7, 1926, Phoenix was on a branch line; that is to say, on the Arizona Eastern up until 1924, that carrier being at the time a subsidiary of the Southern Pacific, and after 1924 on the Phoenix branch of the Southern Pacific. It is generally true that rates to branch-line or foreign-line points are higher than to main-line points, a branch-line or joint-line arbitrary being added. A rate might be reasonable to Phoenix, higher than to a point on the main line; and for a time, prior to 1921, the carriers, with the Commission's approval, charged higher rates to Phoenix than to main-line points.

(Testimony of J. L. Fielding.)

My Exhibit "F" shows a rate of 96½ cents from San Francisco to Phoenix. In 1922 the Phoenix rate was reduced to 86½ cents. My Exhibit "F" does not show that reduction, and that was not its purpose. The exhibit is not incorrect, for it does not purport to show what rate was in effect to Phoenix after July 1, 1922. For the purposes of the comparison, we took the rate prescribed by the Commission to Phoenix, which was 96½ cents; and while this was not the rate actually charged to Phoenix, because of subsequent voluntary reductions, it was the rate which the Commission stated could be charged on shipments to Phoenix. The rates to Phoenix and to [226] other points were voluntarily reduced 10 per cent in 1922, in response to the Commission's suggestion in Reduced Rates 1922, 68 I. C. C. 676. Exhibit "F" compares the rates to Tucson, actually charged upon plaintiffs' shipments, with the Commission-made rate to Phoenix of 96½ cents, although the latter was not actually in effect at Phoenix after July 1, 1922.

Globe was on the Arizona Eastern up to 1924, at which time the Arizona Eastern became a part of the Southern Pacific, and Globe became a Southern Pacific branch-line point. It was never on the main line of the Southern Pacific. The rate to Globe was approved by the Commission. Tucson has always been a main-line point. The general reduction of 10 per cent also applied to the rates to Globe and

(Testimony of J. L. Fielding.)
Safford, Safford also having been a branch-line point."

The witness was then asked by plaintiffs' counsel whether, in attempting to reach reasonable rates for Arizona, carriers had contended that such rates should be 120 per cent of the Memphis-Southwestern rates; to which question defendants objected upon the ground that the same was improper cross-examination, which objection was overruled by the Court. Defendants then and there duly excepted to said ruling of the Court.

Witness Fielding then testified further as follows:

"It is not correct that carriers have contended that rates to and from Arizona should be 120 per cent of the Memphis-Southwestern rates. We have never made any contention that rates from California to Arizona should bear any relation to the rates in the Southwest. We have made comparisons showing that the rates in this territory should be anywhere from 30 per cent to 40 per cent higher than the general level of the Southwestern rates. I appeared in Docket 16742, but the carriers never took any position there that the Arizona rates on sugar should be 120 per cent of the Memphis-Southwestern rates.

I have not brought with me the actual tariffs in which the [227] rates were published as shown upon my exhibits. The numbers of the tariffs are shown,

(Testimony of J. L. Fielding.)

and all tariffs shown were duly published and filed.

In determining the rate from San Francisco to Tucson, no arbitrary was added over the rate from Los Angeles to Tucson. The rate prescribed for the future in Docket 16742 was 65 cents from the Los Angeles group, and 77 cents from the San Francisco group."

Re-direct Examination:

"I am familiar with the rate-adjustment to Phoenix following 1921. At all times subsequent to the First Phoenix Case, decided in June, 1921, the rates to Phoenix were the same as to Maricopa and Tucson up until 1925, regardless whether Phoenix was on a branch line or on the Arizona Eastern. The purpose of my Exhibit "F" was to compare the rates charged with the rates which the Commission had prescribed or approved for application on the same commodity to other destinations. It was not my purpose to compare the rates charged with the rates actually in effect to these other points. At all times prior to 1924 the Arizona Eastern was a solely controlled subsidiary of the Southern Pacific."

Thereupon defendants rested.

Thereupon, plaintiffs offered certain testimony in rebuttal as follows:

TESTIMONY OF L. G. REIF:

Direct Examination.

(It was stipulated, on behalf of defendants, that Mr. Reif was qualified, as an expert familiar with rates and tariffs, and competent to compile exhibits showing such rates and tariffs.)

"I am Rate Expert for the Arizona Corporation Commission, and have been employed in that position since 1925. I am qualified to appear before the Interstate Commerce Commission. The statement which you show me is an exhibit setting forth the average distances in miles from the southern California group to various groups in [228] Arizona designated by name, together with the rates on sugar prescribed in the Memphis-Southwestern Cases, rates made 120 per cent of the Memphis-Southwestern rates, and rates prescribed herein for purposes of reparation and for the future, together with certain other comparisons. Rates from northern California, made on the basis of arbitraries over the southern California rates, are shown in columns 7 to 11, inclusive. The sources from which the information shown on the exhibit is taken are set forth on sheet 2."

Thereupon, plaintiffs offered in evidence as their Exhibit 5, the statement identified and referred to in the testimony of the witness; to which defend-

(Testimony of L. G. Reif.)

ants objected upon the ground that the same was not proper rebuttal, in that it was not offered in rebuttal of any testimony submitted by the defendants in their case in chief, and did not undertake to deal with any testimony offered by defendants' witness, or any showing made in defendants' exhibits. Defendants' said objection was overruled by the Court, to which ruling defendants then and there duly excepted. Said statement was thereupon received in evidence as Plaintiffs' Exhibit 5, and is, in words and figures, as follows: [229]

Thereupon, plaintiffs offered certain testimony in rebuttal as follows:

TESTIMONY OF L. G. REIF:

Direct Examination.

(It was stipulated, on behalf of defendants, that Mr. Reif was qualified, as an expert familiar with rates and tariffs, and competent to compile exhibits showing such rates and tariffs.)

"I am Rate Expert for the Arizona Corporation Commission, and have been employed in that position since 1925. I am qualified to appear before the Interstate Commerce Commission. The statement which you show me is an exhibit setting forth the average distances in miles from the southern California group to various groups in [228] Arizona designated by name, together with the rates on sugar prescribed in the Memphis-Southwestern Cases, rates made 120 per cent of the Memphis-Southwestern rates, and rates prescribed herein for purposes of reparation and for the future, together with certain other comparisons. Rates from northern California, made on the basis of arbitraries over the southern California rates, are shown in columns 7 to 11, inclusive. The sources from which the information shown on the exhibit is taken are set forth on sheet 2."

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(Testimony of L. G. Reif.)

ants objected upon the ground that the same was not proper rebuttal, in that it was not offered in rebuttal of any testimony submitted by the defendants in their case in chief, and did not undertake to deal with any testimony offered by defendants' witness, or any showing made in defendants' exhibits. Defendants' said objection was overruled by the Court, to which ruling defendants then and there duly excepted. Said statement was thereupon received in evidence as Plaintiffs' Exhibit 5, and is, in words and figures, as follows: [229]

Plaintiff's Exhibit no 5.

	FROM SOUTHERN CALIFORNIA GROUP							FROM NORTHERN CALIFORNIA GROUP				
		1	2	3	4	5	6	7	8	9	10	11
TO	(a) Average Distance	Rates Charged	Memphis-Southwestern Sugar Rates	120 Per Cent Memphis-Southwestern Sugar Rates	Rates Prescribed for Reparation Period	120 Per Cent Consolidated Southwestern Sugar Rates	Rates Prescribed for Future	Arbitraries	Rates in Column 3 Plus Arbitraries	Rates Prescribed for Reparation Period	Rates in Column 5 Plus Arbitraries	Rates Prescribed for Future
	(Miles)		(Cents)	(Cents)	(Cents)	(Cents)	(Cents)	(Cents)	(Cents)	(Cents)	(Cents)	(Cents)
Group 1-												
Yuma	267	SEE	40	48	66	45½	46	20	68	66	65½	66
Group 2-												
Kingman	388		47	56	68	56½	57	12	68	69	68½	69
Group 4-		RULE										
Tucson												
Prescott	539		55	66	73	65	65	12	78	77	77	77
Williams												
Flagstaff		V										
Group 5-												
Winslow		STATE										
Bisbee												
Bowie	635		59	71	75	72	72	12	83	84	84	84
Douglas												
Holbrook		MENTS										
Group 6-												
Safford	674		60	72	77	74½	75	12	84	87	86½	87
Group 7-												
Gallup												
Clifton	752		64	77	79	79	79	10	87	89	89	89
Globe												

REFERENCES

Column 1 See Rule V Statements (or reparation claims).
2 For rates see 77 I.C.C. 595.
3 Rates shown in 77 I.C.C. 595 plus 20 per cent.
4 140 I.C.C. 180
5 Rates shown in 123 I.C.C. 452, 477 plus 20 per cent.
6 140 I.C.C. 181.
7 Arbitraries added by Commission to the rates from Southern California Groups to make the through rates from Northern California Groups, 140 I.C.C. 181.
8 Memphis-Southwestern sugar rates plus 20 per cent plus arbitraries.
9 140 I.C.C. 180.
10 Consolidated Southwestern sugar rates plus 20 per cent plus arbitraries.
11 140 I.C.C. 181.
(a) See Docket 16742, 140 I.C.C. 171, at 178.

(Testimony of L. G. Reif.)

Cross Examination:

"Exhibit 5 was prepared in Mr. Blaine's office, under his supervision, and afterwards handed to me to be introduced here. I checked the exhibit to see that it was correct, and helped to a certain extent in its preparation. We did not show the distances from northern California points, or use rates based on the Memphis-Southwestern scale applied to those distances; we used arbitraries instead, because that is the usual practice, and was followed by the Commission in prescribing the sugar rates. I do not assert that 120 per cent of the Memphis-Southwestern scale is a measure of the reasonableness of the rate from Los Angeles to Yuma, Arizona, or any other Arizona destination. I do not favor 120 per cent of the Memphis-Southwestern scale as a fair measure of the rates from northern California to Tucson, or in any other instance. I say that the rates should be lower than 120 per cent. I failed to show the mileages from northern California points to the Arizona destinations because we used the arbitraries, in the same manner as the Commission. This comparison is predicated upon the theory that the carriers have contended that 120 per cent of the southwestern rates is the measure of a reasonable rate from California to Arizona, although carriers have also used 130 per cent. I used 120 per cent because that is the percentage set up in the Sugar Cases.

We were interveners in the First Phoenix Case, in which the Commission prescribed 96½ cents from

(Testimony of L. G. Reif.)

California points to Phoenix, and I am familiar with the case to that extent. I have never made any comparison between the 96½-cent rate, prescribed in that case from Los Angeles to Phoenix, and rates derived from the southwestern scales for the same distance, either on the 120-per-cent basis, or otherwise."

Thereupon, defendants moved the Court to strike Exhibit 5 from the record, upon the ground that the same was incompetent, in that it was not prepared by the witness or at his direction; and upon [230] the further ground that it was predicated upon the assumption of facts not in evidence, and upon assumptions shown to be contrary to the undisputed evidence; and upon the further ground that it was not proper rebuttal, and not in rebuttal of any showing made by defendants in their case in chief. Defendants' said motion was denied and overruled by the Court, to which ruling defendants then and there duly excepted.

Thereupon both parties rested.

Thereupon, defendants moved the Court to render and enter judgment in each of these cases, in favor of defendants and against the plaintiffs, based upon the pleadings and the evidence, which motion was denied; to which ruling of the Court denying their said motion defendants then and there duly excepted.

Thereafter and on November 9, 1932, the causes were orally argued by counsel for the respective parties, and submitted to the Court for decision, subject to further hearing upon the question of the fees to be allowed to plaintiffs' attorneys and counsel in the event plaintiffs should finally prevail. Thereafter, and on December 27, 1932, the Court announced that he was of opinion that after the final submission of the causes, plaintiffs would be entitled to recover.

Thereafter, and on January 17, 1933, and pursuant to stipulation and agreement of the parties, said causes came on regularly for hearing with respect to the amount of the attorneys' fees to be allowed by the Court to plaintiffs' attorneys. To support their contentions as to said attorneys' fees, plaintiffs offered the following testimony, to-wit:

(It appearing that Samuel White, Esquire, one of the plaintiffs' counsel, was unable to be present, it was agreed by and between plaintiffs and defendants that if Mr. White were present and sworn as a witness, he would testify substantially as appears in the following statement): [231]

STATEMENT OF SAMUEL WHITE:

"I have been a practicing attorney for fifty-one years, with experience before the courts of Arizona and Oregon and various federal courts, including

(Testimony of Samuel White.)

the United States Supreme Court. In my practice I have had considerable experience in connection with cases based upon reparation orders of the Interstate Commerce Commission. In the instant cases and other cases of this same kind now under discussion I have expended a great deal of time, effort and energy in preparation, including preparation of the complaints, research of the law, preparation of briefs and arguments, and preparation for trial. In these cases I have collaborated with Mr. Snell. The handling and prosecution of these cases involves a great deal more effort and professional ability than would be required in an action upon a promissory note or the foreclosure of a mortgage.

After considering the amount involved in the cases and the character of the services rendered, it is my opinion that a reasonable fee for the services rendered in connection with these cases before the District Court is 25 per cent of the total amount involved; that is to say, 25 per cent of the principal, plus interest, due to date."

TESTIMONY OF FRANK L. SNELL, JR.

Direct Examination.

"My name is Frank L. Snell, Jr. I am a practicing attorney, and a graduate of the Kansas University Law School. (Mr. Snell's qualifications were then admitted by defendants). My practice has been before the Superior Courts of Arizona, and the

(Testimony of Frank L. Snell, Jr.)

courts of New Mexico and Missouri, and before various federal courts, including the Supreme Court of the United States. I have had experience in the preparation, handling and disposition of reparation cases such as the present cases, which experience goes back over the past four years. Particular and special knowledge is essential in cases of this kind, which I consider to be in the nature of a special class [232] of legal work. I have made a special study of these cases, and of the law involved. I have been associated with Judge White in the instant cases. Among the services rendered in connection with these particular cases were the following: preparation of the complaints; argument of demurrer and preparation of authorities in No. L-844; an attempt to reach an agreed statement of facts in each case which was, however, unsuccessful; and the actual preparation for trial, including consultation with Witness Reif, and the preparation of exhibits and other evidence. It was also necessary to anticipate the defendants' evidence, and therefore to prepare rather full and comprehensive trial briefs, all of which was done in collaboration with Judge White. The next was the trial of the cases, following which there was oral argument, and the preparation of briefs which I submitted. There has also been the necessary preparation for this hearing on attorneys' fees, which will be followed, I presume, by preparation of findings of fact, conclusions of law and the judgments. In cause No. L-738-Phoenix,

(Testimony of Samuel White.)

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(Testimony of Frank L. Snell, Jr.)

courts of New Mexico and Missouri, and before various federal courts, including the Supreme Court of the United States. I have had experience in the preparation, handling and disposition of reparation cases such as the present cases, which experience goes back over the past four years. Particular and special knowledge is essential in cases of this kind, which I consider to be in the nature of a special class [232] of legal work. I have made a special study of these cases, and of the law involved. I have been associated with Judge White in the instant cases. Among the services rendered in connection with these particular cases were the following: preparation of the complaints; argument of demurrer and preparation of authorities in No. L-844; an attempt to reach an agreed statement of facts in each case which was, however, unsuccessful; and the actual preparation for trial, including consultation with Witness Reif, and the preparation of exhibits and other evidence. It was also necessary to anticipate the defendants' evidence, and therefore to prepare rather full and comprehensive trial briefs, all of which was done in collaboration with Judge White. The next was the trial of the cases, following which there was oral argument, and the preparation of briefs which I submitted. There has also been the necessary preparation for this hearing on attorneys' fees, which will be followed, I presume, by preparation of findings of fact, conclusions of law and the judgments. In cause No. L-738-Phoenix,

(Testimony of Frank L. Snell, Jr.)

the total amount involved, as computed by Judge White and myself, being principal, plus interest to January 16, 1933, is $1,096.25; the corresponding total in cause No. L-844-Phoenix is $1,779.70.

In my opinion a fee of 25 per cent of the total amount involved would be a reasonable fee. I base that opinion upon consideration of all the work necessary in these cases and the other reparation cases now being considered, and considering also the time expended, which was 182 office hours and 30 court hours, not including Judge White's time. I have checked this figure, by computing our office time on the basis of $15.00 per hour and our time in court at $200.00 per day."

Cross Examination.

"I justify $15.00 per hour for office work on the basis of charges made to insurance companies and companies which are pretty careful about their fees and it has always been accepted. It is [233] the regular charge of our office. The regular charge of our office for a day in court is $200.00. We are paid at the rate of $15.00 per hour for office work in other transactions not involving trial work. That is not an arbitrary charge, for some cases justify larger and some cases smaller charges. The preparation in this case was not as difficult as the original preparation in the Arizona Grocery Case, but one has to be very careful to be sure that the complaint agrees with the Commission's order. It is not a matter that can be treated with indifference. You

(Testimony of Frank L. Snell, Jr.)

do not have to pay any more attention to detail in a case of this kind than in the case of a mortgage foreclosure. I acquired considerable knowledge of the Interstate Commerce Act in the Arizona Grocery Case, but I spent a great deal more time in that case than in the present cases upon the preparation.

In cases of this character $200.00 for each court day would be the minimum fee. I do not know about any other firm's collections, though other firms do charge that for their work. In public liability cases, with considerable amounts involved, where we are successful, $200.00 per day is the minimum charge. The charge of $15.00 per hour for office work is based upon the study made in our own office some years ago. I have made a study of the matter among the attorneys here in Phoenix, and found that various amounts were being charged, depending upon the men doing the work.

I do not believe there is any office, and ours is no exception, that works arbitrarily on an hourly basis. I have used that basis in checking the fee in these cases and found that it approximated the 25 per-cent fee which I consider to be fair. In our insurance company practice the clients have accepted the basis above outlined, although in the trial of cases we are upon a per diem basis and the amount paid depends on the case. We have not accepted compensation from the insurance com-

(Testimony of Frank L. Snell, Jr.)
panies on the basis of $100.00 retainer, and $100.00 per day fee.

My figure of $15.00 per hour for office work [234] approximates $100.00 per day, although the actual work in the office will not exceed five or six hours. On that basis, the average charge for each day's work figures about $75.00, or possibly less."

Thereupon plaintiff rested.

Thereupon defendants offered testimony with respect to the amounts to be allowed as plaintiffs' said attorneys' fees as follows:

TESTIMONY OF BURTON MASON:

Direct Examination:

"My name is Burton Mason; I am Commerce Attorney for the Southern Pacific Company. I have had 10½ years' experience in commerce work. I am admitted to practice in California and in the various federal courts, including the Supreme Court. I am also admitted to practice before the Interstate Commerce Commission, the Board of Tax Appeals, and the Treasury Department. I have had varied experience as a commerce attorney, in the handling of rate and traffic matters, and reparation cases. I have appeared on behalf of shippers, prior to my connection with the Southern Pacific, and during the last 6½ years as a representative of the carriers. In my experience I have become acquainted with the fees charged and al-

(Testimony of Burton Mason.)

lowed for services of counsel in reparation cases, from the standpoint of the shippers as well as of the defendant carriers.

I have made a study of various cases in which reparation was involved, including cases in which I have myself participated. In the Meeker Case, which went to the Supreme Court, the total amount of the judgment was $109,000, and the fee allowed in the District Court, as corrected by the Supreme Court, was $7,500.00, or less than 7½ per cent of the total. In the Feintuch Case, 191 Fed. 482, which was also a reparation case, total judgment was for $464.55, a comparatively small amount; and an attorney's fee of $150.00, or about one-third, was allowed. In the Ingalls Case, 51 Fed. (2d) 310 the recovery was $196.29. Although the prosecution of the case in- [235] volved considerable labor, as will be seen from the fact there were two prior decisions, the fee allowed was $75.00. This fee took into consideration the amount involved. In the Lewis-Simas-Jones Case, finally decided by the Supreme Court, 283 U. S. 654, the amount finally paid on account of the reparation award was $1,700.00. This case was tried in the State Court of San Francisco, afterwards appealed to the District Court of Appeal of California, and then submitted to the Supreme Court of California on petition for hearing by that court after decision by the appellate court. It was also heard by the United States Supreme Court on writ of certiorari, where it was briefed and orally argued. The attorney's fee was fixed by arbitration, at $1,-

(Testimony of Burton Mason.)

725.00 to cover all the work in all four courts. If one-third of this fee was allowed for the work in the trial court, it would approximate $575.00, or about 33 per cent. In the World Publishing Company Case, reported 16 Fed. (2d) 130, the total judgment was approximately $9,000.00, and the fee allowed was $2,500.00, covering the work in the trial court and in the Circuit Court of Appeals. In the Montrose Case, 25 Fed. (2d) 750, the total amount of the judgment, plus interest, was $80,000, and the attorney's fee allowed was $7,500.00, or about 10 per cent. In the Baer Bros. Case, 200 Fed. 614, the amount of reparation, not including interest, was $723.00, and the attorney's fee was $250.00, which was considerably less than 25 per cent of the total recovery including interest. In the Consolidated Cut Stone Case, 39 Fed. (2d) 661, the total of the judgment was $30,624.00. The total fee of plaintiff's attorney, covering proceedings in the District Court, the Circuit Court of Appeals, and on petition for certiorari to the Supreme Court, was $7,500.00. If that case were taken as an index in the present case, it would indicate a fee of not more than 15 per cent of the total recovery. In the Sloss-Sheffield Case, finally decided about 1928, 269 U. S. 217, the total judgment including interest was in excess of $300,000.00. The case was vigorously [236] fought. The attorney's fee allowed was $15,000.00, or almost exactly 5 per cent. In the Mills Case, 226 Fed. 812, the amount of the recovery was in excess of $9,000.00. There was a trial before a jury and afterwards proceedings were

(Testimony of Burton Mason.)

had in the Circuit Court of Appeals and in the Supreme Court. An attorney's fee of $1,000.00 was allowed for the services in the trial court and the same amount for services in the Court of Appeals. The fee for the work in the trial court was thus about 11 per cent of the amount recovered. In the Minds Case, 237 Fed. 267, the total amount recovered was $49,711.00, and the fee allowed was $10,000, which covered all of the work in the trial court and upon appeal to the Circuit Court of Appeals and the Supreme Court of the United States. In the Standard Oil Case, recently decided, the amount of reparation, exclusive of interest, was $380,000.00, and the amount of the judgment, exclusive of attorneys' fees and costs, was $530,000.00. The case was settled by paying the principal amount, exclusive of interest, or $380,000.00, plus $20,000.00 to cover attorneys' fees, costs and other expenses, or a little more than 5 per cent. I participated actively in that case.

In my opinion a reasonable fee in these cases would be 10 per cent of the amount recovered. While collections may pay 20 per cent, those are small collections, whereas these cases and the other similar cases now being considered are not small cases, the total amount involved being about $26,000.00. While this has taken several suits, they have all been consolidated and practically tried as one. All that was required was the preparation of a simple form of complaint in each case, the form being varied only as to names of plaintiffs and destinations, and amounts. The essential allegations

(Testimony of Burton Mason.)

are identical. While 10 per cent might be comparatively inadequate in one of the smaller cases, it would be more than enough in one of the other cases where the work has been the same but the amount of the recovery happens to be greater. [237]

In the Union Oil Company and Shell Oil Company Cases, in which I participated, plaintiffs obtained judgments after lengthy proceedings, including a trial and oral argument. The judgments, including interest on the reparation awards amounted to about $173,000.00. The trial court in those cases, after hearing on the question of counsel fees, awarded a fee of 10 per cent of the total recovery. That money was never actually paid because the cases were settled by paying the principal sums of reparation, without interest, but with a fee of $15,000.00 to cover all services.

In these cases and in the other cases of similar character here being considered, Mr. Snell has pointed to a total of 182 office hours and 30 court hours, and proposes that his total compensation for this work should be $3,762.00. The annual salary of a United States District Judge is $10,000, less whatever income tax may be assessed. In the Train Limit Cases, with which I am somewhat familiar, the Master has done far more than three times the amount of work claimed to have been done by Mr. Snell and has received a fee of $11,000.00. On the basis of the Master's compensation, Mr. Snell's fee in all of these cases should be about $1,500.00, or about 10 per cent. If we suppose that the

(Testimony of Burton Mason.)

Court sits 250 working days a year, the Judge's compensation is equal to $40.00 per day; and yet plaintiff's counsel claims $100.00 for office work and $200.00 a day for court work. It is probable that all judges of the District Courts are underpaid, particularly the judges who have to listen to reparation suits."

Defendants thereupon rested, and the testimony was closed.

Thereupon the Court stated that in his opinion a fee of about 20 per cent of the total amount involved would be a reasonable attorney's fee; and did then and there render and enter an order allowing to plaintiff's attorneys 20 per cent of the total amount recovered as the fees to be paid the plaintiffs' attorneys and counsel, when and if judgment should be rendered for the plaintiffs. [238] To the Court's said order, finding and ruling defendants then and there in open court duly excepted.

Thereupon the Court ordered special findings of fact and conclusions of law to be proposed, and withheld judgments until said findings and conclusions should be settled.

Thereafter, the plaintiffs did file their written request for special findings of fact and conclusions of law by the Court; and defendants filed written proposed amendments and additions to the findings of fact and conclusions requested by the plaintiffs; and defendants further filed written special findings of fact and conclusions of law requested by them.

Thereafter, and on the 12th day of May, 1933, the Court did in open court hear argument upon such proposed findings and conclusions, and the amendments and additions to plaintiffs' requested findings of fact and conclusions of law, as proposed by defendants; and defendants did then and there, by their counsel, duly request the Court by written instrument, and also orally in open court, to make the following findings of fact, to wit (Paragraphs are numbered according to the written Special Findings of Fact requested by defendants, and on file in these cases:

5. Thereafter, under date of March 12, 1928, said Commission made and entered its report and order in said Dockets Nos. 16770, Sub-No. 2, and 17549, Sub-No. 1, and associated cases (including a proceeding known as Docket No. 16742) decided concurrently therewith, which said report of the Commission is contained in its official reports: 140 I. C. C., at pp. 171 and following. A true and correct copy of said report and order is annexed to the complaint on file in Cause No. L-738-Phoenix, and marked Exhibit "A". Reference is hereby made to said report for further particulars.

6. Thereafter, pursuant to said report, and in accordance [239] with Rule V of the Rules of Practice of said Commission, plaintiffs prepared the Rule V statements showing the shipments

upon which reparation was claimed, copies of which said Rule V statements are attached to the complaints on file herein, as heretofore set forth.

7. Thereafter, under date of September 7, 1929, said Commission made and entered its order directing and requiring defendant Southern Pacific Company to pay to plaintiffs Baffert and Leon, on or before October 22, 1929, as reparation and damages, the amount set opposite the name of said defendant in said order, with interest thereon at the rate of 6 per cent per annum from the respective dates of payment of charges as shown in said Rule V statement annexed as Exhibit "B" to the complaint on file in Cause No. L-738-Phoenix, as heretofore referred to. A copy of said reparation order is annexed as Exhibit "C" to said complaint in Cause No. L-738-Phoenix, and is hereby referred to for further particulars.

Thereafter, under date of April 13th, 1930, said Commission made and entered its order directing and requiring said defendants therein named to pay to plaintiff Wheeler-Perry Company, on or before the 28th day of May, 1930, as reparation and damages, the amounts set opposite their respective names in said order, with interest thereon at the rate of 6 per cent per annum from the respective dates of the payment of charges as shown in said Rule V statement

annexed as Exhibit "A" to the complaint in Cause No. L-844-Phoenix, as heretofore referred to. A copy of said reparation order is annexed as Exhibit "B" to the complaint in Cause No. L-844-Phoenix, and is hereby referred to for further particulars.

9. Under date of May 25, 1915, in response to a complaint [240] attacking as unreasonable the rates on sugar in carloads from all points in California to all destinations in Arizona (including Tucson) said Commission, after full hearing and investigation, rendered its report and order in a proceeding known and entitled as Docket No. 6806, Ariz. Corp. Comm. v. A. T. & S. F. Ry. Co., et al., 34 I. C. C. 158. Reference is hereby made to said report of said Commission, as set forth in its official reports, for further particulars.

As more fully appears from said report, the complaint in said Docket No. 6806 was filed with the Commission on April 15, 1914. During the pendency of said proceeding the carriers named as defendants therein voluntarily reduced their rates on sugar from all points of origin in California to substantially all destinations in Arizona, including Tucson. Such voluntary reductions included in particular the establishment of rates on sugar, in carloads, from all said points in California to all said destinations in Arizona, subject to a minimum weight of 60,000 pounds per car, which rates

were in all cases less than the rates theretofore applying from and to the same points in connection with a carload minimum weight of 36,000 pounds. In and by its said report in said Docket No. 6806 said Commission duly found, among other things, that the rates on sugar to Tucson, as voluntarily reduced during the pendency of said proceeding, were and in future would be just and reasonable. No order respecting said rates to Tucson was made by said Commission in said Docket No. 6806.

The character and extent of said reductions, and in particular of the reductions in the rates to Tucson, is set forth in said report in said Docket No. 6806.

10. In compliance with the Commission's said findings in said Docket No. 6806, the carriers parties to the rates [241] therein involved continued until and including December 29, 1917, the rates on sugar in carloads, from the several points in California to the destination in Arizona involved in this cause, which were in effect on said May 25, 1915. Upon said December 29, 1917, possession, control and operation of the railroad properties of the defendants and generally of all other railroad common carriers throughout the United States were assumed by the Director-General of Railroads, as Agent of the President of the United States, and said Director-General continued in such possession, control and operation until and including Feb-

ruary 29, 1920. Said rates heretofore last-mentioned were continued in effect by said Director-General from and after said December 29, 1917, until, but not including, June 25, 1918. On June 25, 1918, said Director-General caused said rates to be increased as specified and provided in General Order No. 28, issued by said Director-General pursuant to authority conferred by the Federal Control Act, 40 Stat. L. 456. Upon November 25, 1919, said rates, as modified by the changes made pursuant to said General Order No. 28, were further modified pursuant to and as provided by an order duly issued by said Director-General, styled "Freight Rate Authority No. 8016, dated May 16, 1919". Said order last mentioned, also issued pursuant to authority duly conferred by said Federal Control Act, brought about a general readjustment of rates on sugar throughout the western part of the United States. On February 29, 1920, said Director-General, by order duly made, further modified said rates heretofore mentioned by canceling the rate from California points to Tucson, then and theretofore in effect, subject to a carload minimum weight of 36,000 pounds. The rate then and theretofore in effect from and to said points, [242] subject to a carload minimum weight of 60,000 pounds, was continued without further modification until, but not including, August 26, 1920.

11. On March 1st, 1920, upon the termination of Federal control, the several defendants and

other carriers resumed possession and control of their railroad properties. Said carriers, parties to the rates on sugar from said California points to Tucson, maintained from and after said last mentioned date until, but not including, August 26, 1920, said rate on sugar subject to a carload minimum weight of 60,000 pounds which was in effect from and to said points at the date of termination of Federal control. On said date last mentioned said rate was increased to 96½ cents per hundred pounds, as authorized by the report and order of said Commission in the proceeding entitled Ex Parte 74, Increased Rates 1920, 58 I. C. C. 220, to which report reference is hereby made for further particulars. Said report and order authorized general percentage advances in interstate freight rates throughout the United States.

12. Said rate of 96½ cents, as made effective August 26, 1920, was voluntarily reduced by said defendants, on July 27, 1921, to 96 cents; and was further voluntarily reduced by said defendants, effective July 1st, 1922, to 86½ cents. Said reduction last-mentioned was in conformity with the recommendations made by said Commission in its report in a proceeding entitled: Reduced Rates 1922, 68 I. C. C. 676, to which report reference is hereby made for further particulars. Said rate of 86½ cents last-mentioned was further voluntarily reduced by said defendants, on or about January 11, 1924, to 84 cents. Said rate of 84 cents con-

tinued in effect until and including October 27, 1925, upon which date the same was reduced to 75 cents, pursuant to the [243] findings and order of said Commission in a proceeding numbered and entitled Docket No. 14140, Solomon-Wickersham Co. v. S. M. V. R. Co., 101 I. C. C. 667, to which report reference is hereby made for further particulars. Said rate of 75 cents remained in effect until, but not including, June 11, 1928, upon which date the same was reduced to 65 cents per hundred pounds from points in southern California, including Betteravia and Oxnard, and advanced to 77 cents per hundred pounds from points in northern California, including San Francisco and Crockett, pursuant to the findings and order of said Commission in said Docket No. 16742, heretofore referred to. Said rates of 86½ cents, 84 cents and 75 cents, which were successively in effect during the period July 1, 1922, to June 10, 1928, both inclusive, were the rates assessed upon plaintiffs' shipments during the period of movement thereof, as shown upon said Rule V statements annexed to the complaints on file herein, and are the rates referred to "As Charged" upon said statements.

13. On or about the 22nd day of June, 1921, and after full hearing and investigation, said Commission rendered its report and order in a proceeding entitled Docket No. 11532, Traffic

Bureau, Phoenix Chamber of Commerce, et al. v. Director-General, et al., 62 I. C. C. 412 (to which report reference is hereby made for further particulars) wherein and whereby said Commission found, among other things, that the reasonable rate thereafter to be applied to the transportation of sugar in carloads, minimum weight 60,000 pounds, from points of origin in California (including the points of origin of the plaintiffs' shipments involved herein) to Phoenix, Arizona, should not exceed 96½ cents per hundred pounds. The usual and customary routes of movement from said points of origin in California to Phoenix, Arizona, [244] were identical with the corresponding routes of movement of shipments from said points to Tucson, Arizona, as far as and including Maricopa, Arizona, a point 35 miles by rail from Phoenix; and the distances over said routes of movement from said points of origin in California to Phoenix were at all times, during the period of movement of the plaintiffs' shipments involved herein, 51 miles less than the corresponding distances from said points of origin to Tucson. Said order of said Commission in said proceeding last-mentioned, Docket No. 11532, specified that said rate of 96½ cents should be observed as the reasonable maximum rate from California points to Phoenix until the further order of said Commission; and no further order with respect to said rate was made by said Commis-

sion during the period of movement of the plaintiffs' shipments, or until January 6, 1925, effective February 25, 1925. During all of said period, and prior to February 25, 1925, said rate of 96½ cents was, and continued to be, the duly established and conclusive measure of a just and reasonable rate on sugar from the points of origin in California involved herein to Phoenix and related points in Arizona, including Tucson in particular.

14. On November 3, 1921, and after full hearing, said Commission rendered its report and order in a proceeding entitled Docket No. 11442, Traffic Bureau, Douglas Chamber of Commerce & Mines v. A. T. & S. F. Ry. Co., et al., 64 I. C. C. 405 (to which report of said Commission reference is hereby made for further particulars), in response to a complaint alleging, among other things, that the rates on sugar in carloads from points in California, including all of the points of origin of plaintiffs' said shipments, to Douglas, Arizona, were unreasonable and otherwise in violation of [245] the Interstate Commerce Act. In said report said Commission found that said rate, which at the date of said complaint was 96½ cents per hundred pounds, was and in future would be not unreasonable. No further findings or order with respect to said rate on sugar to Douglas were made by said Commission, subsequent to the report in said Docket No. 11442, until March 12, 1928, the date of the findings and order in

said Docket No. 16742 and associated cases, to which reference has heretofore been made. The direct and customary routes of movement of the shipments of the plaintiffs from points in California to Tucson, Arizona, during all of the period of the movement thereof, were identical with the corresponding routes over which shipments of sugar moved from said points in California to Douglas, Arizona, so far as and including Tucson itself; and the distances from said points of origin in California to Douglas, Arizona, were, during all of said times, 123 miles greater than the corresponding distances from said points of origin to Tucson. During all of the period of movement of the plaintiffs' shipments, said rate of 96½ cents to Douglas, found reasonable by said Commission in its report in said Docket No. 11442, was and continued to be the duly established and conclusive measure of a reasonable rate for the transportation of shipments of sugar from the points of origin of plaintiffs' shipments to Douglas and related destinations in Arizona, including Tucson.

15. On June 27, 1923, after full hearing and investigation, and in response to a complaint alleging, among other things, that the rates on sugar, in carloads, from points in California, including the points of origin of plaintiffs' shipments, to destinations in Arizona on the Globe Division of the Arizona Eastern Railroad Company (now the Globe Branch [246] of the

Southern Pacific Company) were unreasonable and otherwise in violation of the Interstate Commerce Act, said Commission rendered its report and order in a proceeding entitled Docket No. 13139: Graham & Gila Counties Traffic Assn. v. A. E. R. Co., et al., 81 I. C. C. 134. In said report said Commission found and declared that said rates, as in effect on January 18, 1922, were and in future would be not unreasonable; and reference is hereby made to said report for further particulars. On said date, January 18, 1922, the rate on sugar from the points of origin of the plaintiffs' shipments to Globe, Arizona, was $1.59 per hundred pounds; the corresponding rate on sugar from said points of origin to Safford, Arizona, was $1.29 per hundred pounds; both said points, Globe and Safford, being located upon said Globe Division, heretofore referred to. The direct short-line routes of movement from the California points of origin of the plaintiffs' shipments to Globe and Safford, were at all times during the period of movement of the plaintiffs' shipments, identical with the routes of movement from said points of origin to Tucson, as far as and including Tucson itself. At all said times the distances from said points of origin to Globe and Safford were, respectively, 237 miles, and 153 miles, greater than to Tucson.

16. The rates and charges assessed and collected upon the plaintiffs' said shipments, as set forth upon the aforesaid Rule V statements were, and each of them was, just and reasonable,

and in full conformity with the Interstate Commerce Act, and were, and each of them was, lawfully applied, assessed and collected by the said defendants.

which requests were severally denied by the Court, and the Court refused to find such facts as so requested, and defendants, by their counsel, then and there duly excepted to each and all of said rulings [247] of the Court in failing to find such facts as so requested by them.

Defendants further did then and there, by their counsel, request the Court by written instrument and also orally in open court, to make the following conclusions of law, to-wit: (Paragraphs are numbered according to the written Special Conclusions of Law requested by defendants and on file in this cause):

1. The rates and charges assessed and collected upon plaintiffs' said shipments of sugar, as shown and set forth in said Rule V statements annexed to the complaints herein, were published, applied and collected by authority of the Interstate Commerce Commission, and had previously been declared by said Commission to be not unreasonable, after full formal investigation, and/or were less in amount than rates which had previously been declared by said Commission to be reasonable after such investigation, subject only to intervening modifications authorized and/or required by the United States, acting through the Director-Gen-

eral, as the Agent of the President, and/or the Interstate Commerce Commission.

2. Said orders of said Interstate Commerce Commission, dated September 7, 1929, and April 13, 1930, and purporting to direct and require said defendants to pay reparation to the plaintiffs with respect to their said shipments shown on said Rule V statements, are in excess of the lawful jurisdiction of said Commission, and therefore were and are null and void and of no effect.

3. Plaintiffs have failed to establish by the evidence any cause of action whatever against the defendants or either or any of them; and have failed to establish that any unreasonable or otherwise unlawful rate or charge was collected upon any of said shipments, or that any reparation whatsoever is due or payable with respect to said [248] shipments or any of them.

4. Plaintiffs are not entitled to recover any amount whatsoever as fees of their attorneys and counsel in said causes; defendants are entitled to judgment against the plaintiffs, that the plaintiffs take nothing by their actions, and that their complaints herein be dismissed.

which requests were severally denied by the Court, and such conclusions were refused; and the defendants, by their counsel, then and there duly excepted to each and all of said rulings of the Court in failing to make such conclusions of law, and in denying such requests.

Defendants by their counsel then and there duly excepted to the rulings of the Court in failing to render and enter judgments in favor of the defendants and against the plaintiffs, predicated upon the findings of fact and conclusions of law proposed and requested by defendants.

Thereupon, the Court did then and there, in open court, make the following findings of fact and conclusions of law, and pursuant to stipulation of the parties, incorporated therein by reference Exhibit "B" attached to plaintiffs' complaint in cause No. L-738-Phoenix, and Exhibit "A" attached to plaintiff's complaint in cause No. L-844-Phoenix, being the so-called "Rule V statements" showing shipments made to and received by said plaintiffs upon which reparation was claimed; which said findings and conclusions were afterwards reduced to writing and filed by said Court in the following words and form, to-wit:

[Title of Court and Causes.]
No. L-738-Phoenix; No. L-844-Phoenix.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

These causes came on regularly for trial and were, by oral stipulation of the parties duly expressed in open court, and pursuant to order of court then and there made, [249] consolidated for purposes of trial and decision, and were jointly tried upon a consolidated record, by the court sitting without a jury, on the 11th day of

October, 1932, a trial by jury having been duly waived by written stipulations of the parties. The parties offered both oral and documentary evidence in support of their respective pleadings herein; and pursuant to stipulation, the parties subsequently, on the 17th day of January, 1933, offered certain oral testimony with respect to the matter of the fees to be allowed plaintiffs' attorneys and counsel; and the Court was duly requested to make, enter and file special findings of fact and conclusions of law prior to rendering judgment. The Court does hereby make and file the following as its special findings and conclusions of law:

FINDINGS OF FACT.

I.

Plaintiffs, F. J. Baffert and A. S. Leon now are, and at all times herein mentioned have been, copartners doing business in the State of Arizona under the firm name of Baffert and Leon.

Plaintiff Wheeler-Perry Company now is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of Arizona, and qualified to do business in said state.

II.

Defendants now are, and at all times herein mentioned have been, corporations duly organized and existing as such, and engaged in the

operation of lines of railroad pursuant to authority of law as common carriers for hire, and in the transportation of property by means of their said lines of railroad, and in conjunction with connecting [250] carriers in interstate commerce, from points in California to points in Arizona.

III.

Heretofore, and at various dates between the 27th day of February, 1923, and the 1st day of May, 1928, plaintiffs shipped, or caused to be shipped, from San Francisco, Crockett, Oxnard and Betteravia, California, to Tucson, Arizona, over the lines of said defendants, certain carload shipments of sugar. There are annexed to the complaints on file herein tabulated statements (hereinafter referred to as "Rule V" statements) which correctly show in detail, among other things, the dates upon which said shipments were made, the dates upon which the transportation charges thereon were collected, the initials and numbers of the cars in which the same were transported, the names of the parties to whom such shipments were consigned and delivered, the routes over which said shipments moved, the several weights of said shipments, the rates thereon asssed and the charges thereon collected (said rates and charges being shown under the columns collectively headed "As Charged" upon said statements), the rates

subsequently found by the Interstate Commerce Commission to have been reasonable, and the amounts which would have accrued as charges under said last mentioned rates (said rates and amounts being shown under the columns collectively headed "Should Be" upon said statements), and the amount of reparation claimed by the plaintiffs and allowed by said Commission with respect to each of said shipments. The Rule V statement showing the shipments consigned to and received by plaintiffs Baffert and Leon, as to which reparation is claimed by said plaintiffs, is attached as Exhibit "B" to the com- [251] plaint on file in Cause No. L-738-Phoenix. The Rule V statement showing the shipments consigned to and received by plaintiff Wheeler-Perry Company, as to which reparation is claimed by said plaintiff, is attached as Exhibit "A" to the complaint on file in Cause No. L-844-Phoenix. Reference is hereby made to said Rule V statements for further particulars, the same as if said statements were physically a part hereof.

IV.

On or about February 6, 1926, plaintiffs Baffert and Leon filed a complaint with the Interstate Commerce Commission, in which it was alleged, among other things, that the rates maintained, assessed and collected by defendants and other common carriers for the transportation of sugar in carloads from various specified

points in California, including the points of origin of said plaintiffs' shipments hereinbefore mentioned, to Tucson, Arizona, were and in future would be unreasonable in violation of Section 1 of the Interstate Commerce Act. Following the filing of said complaint said Commission caused the same to be assigned Docket No. 17549, Sub-No. 1. Thereafter, and in regular course, the defendants named in said complaint filed their answers thereto with said Commission, in which said answers said defendants denied in particular that said rates had been or were unreasonable, or otherwise in violation of the Interstate Commerce Act as alleged, or that said plaintiffs had been or would be damaged thereby.

On or prior to March 6, 1925, plaintiff Wheeler-Perry Company filed a complaint with said Commission, in which it was alleged, among other things, that the rates maintained, assessed and collected by defendants and other common carriers for the transportation of sugar in carloads from [252] various specified points in California, including the points of origin of said plaintiff's shipments hereinbefore mentioned, to Tucson, Arizona, were and in future would be unreasonable, in violation of Section 1 of the Interstate Commerce Act. Following the filing of said complaint said Commission caused the same to be assigned Docket No. 16770, Sub-No. 2. Thereafter, and in regular course, the defendants named in said complaint filed their answers

thereto with said Commission, in which said answers said defendants denied in particular that said rates had been or were unreasonable, or otherwise in violation of the Interstate Commerce Act as alleged, or that said plaintiff had been or would be damaged thereby.

V.

That the Interstate Commerce Commission on March 12, 1928, made and rendered its opinion and order, reported in volume 140 of Interstate Commerce Commission Reports, at page 171 and following, and finding that the rates on sugar in carloads from Betteravia and Oxnard, California, had in the past been unreasonable to the extent that they exceeded a rate and charge of 75¢ per 100 pounds on and after July 1, 1922, and from Crockett and San Francisco, California, had in the past been unreasonable to the extent that they exceeded a rate and charge of 77¢ per 100 pounds on and after July 1, 1922, and that certain of the plaintiffs in said proceedings (including plaintiffs herein) had made shipments at the rates found in said proceeding to have been unreasonable; that they had paid and borne the charges thereon, and were damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the rates found in said proceedings to have been reasonable; and that said complainants (in- [253] cluding plaintiffs herein) were entitled to reparation, with interest. Said

list of shipments set forth as Exhibit "B" in the complaint on file in cause No. L-738-Phoenix and Exhibit "A" in the complaint on file in cause No. L-844-Phoenix, show in detail, as previously stated, the charges actually assessed upon plaintiff's shipments involved in these causes, and the charges which would have accrued thereon upon the basis of the rates declared by said Commission in said abovementioned report and order to have been the reasonable rates to have been applied at said dates of movement, together with the difference between the charges so assessed and those which would have accrued, which said last mentioned differences constitute the amounts herein claimed by the plaintiffs, exclusive of interest and fees of its attorneys and counsel.

VI.

That said freight charges assessed the respective plaintiffs in the above entitled causes on the list of shipments set forth in said Rule V statements hereinabove referred to, same being the shipments involved in these causes, were and are unreasonable as to the plaintiffs and in violation of the Interstate Commerce Commission Act of February 4, 1887, and acts of Congress amendatory thereto.

VII.

That the just and reasonable rates which should have been changed on all of said ship-

ments listed in said Rule V statements above referred to from Betteravia and Oxnard, California, to said points of destination in Arizona after the 1st day of July, 1922, was 73¢ per 100 pounds, and from Crockett and San Francisco, California, to said point of destination in Arizona after the 1st day of July, 1922, [254] was 77¢ per 100 pounds.

VIII.

That the plaintiffs did duly comply with all of the requirements of the Interstate Commerce Commission as to the proof necessary for the amount of said reparations.

IX.

(1) That on the 7th day of September, 1929, said Interstate Commerce Commission, in Docket No. 16742 and causes consolidated therewith, including Docket No. 17549 (Sub-No. 1) duly made and passed its order directing and requiring the defendant Southern Pacific Company to pay to the plaintiffs F. J. Baffert and A. S. Leon, copartners, trading under the firm name of Baffert and Leon (being plaintiff in cause No. L-738-Phoenix, above referred to), the sum of $726.28, together with interest thereon at the rate of six percent (6%) per annum from the respective dates of payment of the charges collected by the defendant from said plaintiffs, said sum to be paid on or before the 22nd day of October, 1929; said sum being the amount of reparation on account of said unrea-

sonable rates charged and collected by said defendant for transportation of said 18 car load shipments of sugar.

(2) That heretofore and on the 13th day of April, 1931, the Interstate Commerce Commission duly made and rendered its Supplemental Order in Docket No. 16742 and causes consolidated therewith, including said Docket No. 16770 (subdivision No. 2), ordering and directing the defendants to pay unto the plaintiff Wheeler-Perry Company (being plaintiff in cause No. L-844-Phoenix above referred to) the following sums, to-wit:

Santa Maria Valley Railroad Company	$ 81.60
Southern Pacific Company	1090.09
	$1171.69

[255]

together with interest thereon at the rate of six percent (6%) per annum from the respective dates of the payment of the charges as shown on said list of shipments above referred to and specifically set forth on Exhibit "A" attached to said plaintiff's complaint filed in this cause.

Said last mentioned Order required the payment of said sums on or before the 28th day of May, 1931; and that the same were as reparation on account of the unreasonable rates charged for the transportation of certain carload shipments of sugar from points in California to points in Arizona (including Tucson, Arizona).

(3) Said defendants have failed and refused to comply with any or all of said Orders, or to pay said sums or any part thereof, to any of said plaintiffs, although demand and request therefor have heretofore been duly made by all of said plaintiffs upon said defendants.

X.

That by reason of said unreasonable rates, charges and payments thereof by the respective plaintiffs, and by reason of the refusal of the defendants to pay said reparations so ordered by the Interstate Commerce Commission, the plaintiffs have been damaged as follows, to-wit:

(1) F. J. Baffert and A. S. Leon, co-partners, trading under the firm name of Baffert and Leon (being plaintiffs in cause No. L-738-Phoenix), $726.28, together with interest thereon at the rate of six per cent (6%) per annum from the respective dates of payment on the charges collected by the defendant Southern Pacific Company down to and including the date hereof amounting to the sum of $344.37, making a total sum of principal and interest of $1,070.65.

(2) Wheeler-Perry Company (being plaintiff in cause No. L-844-Phoenix) by the defendants Southern Pacific Com- [256] pany and Santa Maria Valley Railroad Company in the sum of $81.60, and by the defendant Southern Pacific Company in the sum of $1090.09, together with interest on all of said amounts at the rate of six per cent (6%) per annum from

the respective dates of payment as shown on Exhibit "A" attached to said plaintiff's complaint.

XI.

That the plaintiffs were required to employ attorneys at law to prosecute the present actions in order to effect collection of said reparations, and that twenty per cent (20%) of the total respective amounts due, including interest and principal, in each of said causes, is reasonable as attorneys fees.

CONCLUSIONS OF LAW.

Based upon the foregoing findings of fact, the court finds as conclusions of law as follows:

I.

That the said order of the Interstate Commerce Commission dated September 7, 1929 (being the Order relied upon by plaintiffs in cause No. L-738-Phoenix above referred to) and the Order of the Interstate Commerce Commission dated April 13, 1931 (being the Order relied upon by plaintiff in cause No. L-844-Phoenix above referred to), both of which said orders were made and entered in that certain proceeding before said Commission entitled "Traffic Bureau of Phoenix Chamber of Commerce, et al. v. Atchison, Topeka and Santa Fe Railway Company, et al", docketed as No. 16742, and causes consolidated therewith (including Docket No. 17549, Sub-No. 1, and

Docket No. 16770, which said order required said defendants to pay the various plaintiffs herein certain sums of money as set forth in said orders and in the respective plaintiffs' complaints, [257] were and are legal, valid and binding orders, and were made and ordered by said Interstate Commerce Commission in said cause, and were within the power and jurisdiction conferred upon said Interstate Commerce Commission by law, and that in the making of said orders the said Interstate Commerce Commission acted within its jurisdiction and power.

II.

That the following rates charged the various plaintiffs by the defendants, to-wit:

For a shipment made on September 14, 1923, from Betteravia, California, 86½¢ per 100 pounds;

For a shipment made on October 13, 1923, as shown on Exhibit "A" attached to plaintiff's complaint in cause No. L-844-Phoenix, and made a part thereof, 86½¢ per 100 pounds;

For a shipment made on April 28, 1928, as shown on Exhibit "A" attached to plaintiff's complaint in cause No. L-844-Phoenix, and made a part thereof, 75¢ per 100 pounds;

For shipments made between February 27, 1923 and December 28, 1932, inclusive,

from Crockett and San Francisco, California, 86½¢ per 100 pounds;

For shipments made between January 24, 1924, and September 10, 1925, inclusive, from Crockett and San Francisco, California, 84¢ per 100 pounds;

on carload shipments of sugar, all as shown on the Rule V Statements hereinabove referred to and attached to plaintiff's complaint of the respective plaintiffs herein, were, as found by the Interstate Commerce Commission in said proceedings known as Docket No. 16742, unreasonable to the extent that they exceeded 73¢ per 100 pounds from Better- [258] avia and Oxnard, California, and 77¢ per 100 pounds from Crockett and San Francisco, California, to Tucson, Arizona, during the periods hereinabove set forth; and that the reasonable rates which should have been charged the plaintiffs on account of said shipments over defendant's lines during said periods were 73¢ per 100 pounds from Betteravia and Oxnard, California, and 77¢ per 100 pounds from Crockett and San Francisco, California, to Tucson, Arizona.

III.

(1) That by reason of said unreasonable charges the plaintiffs Baffert and Leon (Being plaintiffs in cause No. L-738-Phoenix) have been damaged, and the defendant Southern Pacific Company is indebted to said plaintiffs in

the sum of $726.28, together with interest thereon at the rate of six per cent (6%) per annum from the respective dates of payment of said charges, as shown on said Exhibit "B" attached to plaintiffs' complaint down to and including the date hereof, amounting to the sum of $344.37, making a total sum of $1,070.65, and the further sum of 20% of said indebtedness, including principal and interest as and for attorney's fees, amounting to the sum of $214.13, together with plaintiffs' costs and disbursements herein expended, and that said plaintiffs are entitled to judgment therefor;

(2) That by reason of said unreasonable charges the plaintiff Wheeler-Perry Company (being plaintiff in cause No. L-844-Phoenix) has been damaged, and the defendants Southern Pacific Company and Santa Maria Valley Railroad Company, are indebted to the said plaintiff in the sum of $81.60, together with interest at the rate of six per cent (6%) per annum from the respective dates of payment of the [259] charges as shown on the list of shipments set forth in Exhibit "A" attached to said plaintiff's complaint, said interest amounting to the sum of $46.74, as of this date, and attorney's fees of twenty per cent (20%) of the total amount of said indebtedness, including principal and interest, said attorney's fees amounting to the sum of $25.68; and the defendant, Southern Pacific Company, is indebted to the said plaintiff in the

sum of $1090.09, together with interest at the rate of six per cent (6%) per annum from the respective dates of payment of the charges as shown on the list of shipments set forth in Exhibit "A", attached to said plaintiff's complaint, said interest amounting to the sum of $581.48, as of this date, and attorneys' fees of twenty per cent (20%) of the total amount of said indebtedness, including principal and interest, said attorneys' fees amounting to the sum of $359.98; together with other lawful costs incurred by said plaintiff in said action; and that the said plaintiff is entitled to judgment therefor.

Dated this 9th day of June, 1933.

F. C. JACOBS, Judge.

Thereupon, defendants did by their counsel in open court duly except to the findings of fact and conclusions of law of the Court in the following particulars, to-wit:

Defendants excepted to paragraph V of the Court's findings of fact, on the ground that the same was and is not sufficiently clear and definite, and upon the further ground that the same was and is not sustained or supported by the evidence, nor in accord with the evidence and the law.

Defendants excepted to paragraph VI of the Court's findings of fact, on the ground that the same was and is not sufficiently clear and definite, and was and is not sustained or supported by the evi- [260] dence, nor in accord with the evidence and the law.

Defendants excepted to paragraph VII of the Court's findings of fact for the reason that the same was and is not sustained or supported by the evidence, and was and is contrary to the evidence and the law, and was and is not sufficiently clear and definite.

Defendants excepted to paragraph VIII of the Court's findings of fact on the ground that the same was and is not sustained or supported by the evidence, and is contrary to the evidence and the law, and upon the further ground that the same was and is not sufficiently clear, definite and concise.

Defendants excepted to paragraph IX of the Court's findings of fact upon the ground that the same was and is not sustained or supported by the evidence, and was and is wholly contrary to the evidence and the law, and upon the further ground that the same was and is not sufficiently clear, definite and concise.

Defendants excepted to paragraph X of the Court's findings of fact upon the ground that the same was and is not sustained or supported by the evidence, and was and is wholly contrary to the evidence and the law.

Defendants excepted to paragraph XI of the Court's findings of fact on the ground that the same was and is not sustained or supported by the evidence, and was and is wholly contrary to the evidence and the law.

Defendants excepted to paragraph I of the Court's conclusions of law upon the ground that the

same was and is not sustained or supported by the evidence, and was and is wholly contrary to the evidence and the law.

Defendants excepted to paragraph II of the Court's conclusions of law upon the ground that the same was and is not sustained or supported by the evidence, and was and is wholly contrary to the evidence and the law, and upon the further ground that the same was and is not sufficiently clear, definite and certain. [261]

Defendants excepted to paragraph III of the Court's conclusions of law upon the ground that the same was and is not sustained or supported by the evidence, and was and is wholly contrary to the evidence and the law, and upon the further ground that the same was and is not sufficiently clear and definite.

Thereafter, and on the 9th day of June, 1933, the Court's written findings of fact and conclusions of law as aforesaid were filed in said causes; and thereupon, and on said 9th day of June, 1933, the Court, upon motion of plaintiffs' attorneys in cause No. L-738-Phoenix, ordered judgment to be rendered and entered in said cause in favor of said plaintiffs and against the defendants, which said judgment was and is in words and figures as follows:

[Title of Court and Cause.]
No. L-738-Phoenix.

This cause having come on regularly to be heard on the 12th day of October, 1932, Samuel

White appearing as counsel for the Plaintiffs, F. J. Baffert and A. S. Leon, and Messrs. Baker & Whitney, Chalmers, Fennemore & Nairn, James E. Lyons & Burton Mason, having appeared as counsel for the defendant, the Southern Pacific Company; and it having appeared that a stipulation containing an express waiver of the right to trial by jury had been signed by all the parties and filed herein; and evidence, both oral and documentary, having been introduced by the parties hereto; and both sides having rested, and said cause having been argued on behalf of the plaintiffs and on behalf of the defendant; and the court having requested the plaintiffs and defendant to file briefs on the matters and questions involved; and said cause having been submitted to the court for its consideration and decision;

And on the 17th day of January, 1933, the court having heard evidence and testimony as to the reasonableness of [262] attorneys' fees to be allowed the plaintiffs herein for the services rendered herein by their attorney in the trial and determination hereof to the date of this judgment as provided by law;

Findings of Fact and Conclusions of Law having been filed by the court herein, as required by the parties hereto, and the court having ordered that, in accordance with said Findings of Fact and Conclusions of Law, judgment be entered in favor of the plaintiffs and against

the defendant in said cause, filed herein, together with twenty per cent (20%) of the total indebtedness, including principal and interest, as and for attorney's fees, and plaintiffs' costs incurred herein;

NOW, THEREFORE, by virtue of the law and by reason of the premises, aforesaid;

It is ORDERED, ADJUDGED and DECREED, that the Southern Pacific Company, a corporation, is indebted to the plaintiffs in the principal sum of Seven Hundred Twenty-six and 28/100 ($726.28) Dollars, together with interest thereon at the rate of six per cent per annum from the respective dates of payment of said charges, as shown on Exhibit "B", attached to plaintiff's complaint, up to and including the date hereof, amounting to the sum of $334.37, making a total indebtedness of $1,070.65, together with 20% of said total sum, including principal and interest, as and for attorney's fees, amounting to the sum of $214.13;

It is further ORDERED, ADJUDGED and DECREED, that the plaintiff is entitled to the sum of $15.90 taxed and allowed as its costs, exclusive of attorney's fees, which is due and owing the plaintiff by said defendant;

It is further ORDERED, that all the above amounts bear interest at the rate of six per cent per annum.

DONE AND DATED this 9th day of June, 1933. [263]

Defendants, by their counsel, then and there duly excepted to said order for judgment, and to said judgment of the Court, and to every part and portion thereof. On said date last mentioned the Court, upon motion of plaintiff's attorneys in cause No. L-844-Phoenix, ordered judgment to be rendered and entered in said cause in favor of the plaintiff therein and against defendants, which said judgment was and is in words and figures as follows:

[Title of Court and Cause.]
No. L-844-Phoenix.

This cause having come on regularly to be heard the 11th day of October, 1932, Elliott and Snell having appeared as counsel for the plaintiff, and Baker and Whitney, Chalmers, Fennemore and Nairn, James E. Lyons, Burton Mason, and Gerald E. Duffy, having appeared as counsel for the defendants; and it having appeared that a Stipulation containing an express waiver of the right to trial by jury had been signed by all of the parties and filed herein; and the respective parties having offered both oral and documentary evidence in support of their respective pleadings herein;

And the trial of said matter having been concluded on the 13th day of October, 1932; and both sides having rested; and said cause having been argued on behalf of the plaintiff and on behalf of the defendants; and the court having requested the plaintiff and the defendants to file authorities on the matters and questions in-

volved; and said cause having been submitted to the court for its consideration and decision;

And on the 17th day of January, 1933, the court having heard evidence and testimony as to the reasonableness of attorneys fees to be allowed the plaintiff herein for the services rendered by its attorneys in the trial and [264] determination hereof to the date of this judgment, as provided by law;

And on the 9th day of June, 1933, Findings of Fact and Conclusions of Law having been filed by the court herein as requested by the parties hereto, and the court having ordered that in accordance with said Findings of Fact and Conclusions of Law, judgment be entered in favor of the plaintiff and against the defendants, and each of them, in said cause filed herein, together with costs of plaintiff incurred herein;

NOW THEREFORE, by virtue of the law and by reason of the premises aforesaid:

It is Ordered, Adjudged and Decreed, that the defendant Santa Maria Valley Railroad Company is indebted to the plaintiff in the principal sum of $81.60, together with interest thereon in the amount of $46.74, together with the sum of $25.68 which is adjudged by the court to be reasonable attorneys fees to be allowed the plaintiff for services rendered by its attorneys in this matter up to the date of this judgment, as provided by law; and

It is further Ordered, Adjudged and Decreed that the defendant Southern Pacific Company

is indebted to the plaintiff in the principal sum of $1090.09, together with interest thereon in the amount of $581.48, together with the sum of $359.98 which is adjudged by the court to be reasonable attorneys fees to be allowed the plaintiff for services rendered by its attorneys in this matter up to the date of this judgment, as provided by law; and

It is further Ordered, Adjudged and Decreed that said defendants, and each of them, are indebted to the plaintiff in the sum of $12.00, same being plaintiff's costs herein taxed, exclusive of attorneys fees; and [265]

It is Further Ordered, Adjudged and Decreed that all of the above amounts shall bear interest at the rate of six percent (6%) per annum until paid.

Dated this 9th day of June, 1933.

Defendants, by their counsel, then and there duly excepted to said order for judgment, and to said judgment of the Court, and to every part and portion thereof.

Thereafter, and on or about the 10th day of June, 1933, plaintiffs in cause No. L-738-Phoenix, by their counsel, filed and served a statement of costs and disbursements, together with a notice of the time and place of application to tax costs, in which said statement said plaintiffs claimed, as items of costs to be taxed and allowed by the Court herein, the sum of $222.82 as reasonable fees of their attorneys and counsel, and the sum of $3.90 as expense of

securing from the Interstate Commerce Commission certified copies of Rule V statements, report and findings, and order for reparation. On or about said 10th day of June, 1933, plaintiff in cause No. L-844-Phoenix, by its counsel, filed and served a statement of costs and disbursements, together with a notice of time and place of application to tax costs; and in said statement said plaintiff claimed, as an item of costs to be taxed and allowed by the Court herein, the sum of $359.98 as reasonable fees of its attorneys and counsel to be collected from defendant Southern Pacific Company, and the sum of $25.68 as reasonable fees of its attorneys and counsel to be collected from defendants Southern Pacific Company and Santa Maria Valley Railroad Company.

Thereafter, and on the 19th day of June, 1933, the Clerk of said Court heard defendants' objections to the aforesaid items of costs and disbursements, and defendants then and there presented their oral and written objections to the aforesaid items of attorneys' fees and of the expense of securing said certified copies of Rule V statements and other documents from said Commission; and the [266] Clerk of said Court, and the Judge thereof, over said objections of defendants, then and there allow said items as proper items of costs; to which said ruling and order defendants then and there duly excepted.

Thereafter, pursuant to stipulation of the parties dated July 8, 1933, the Court entered an order as of June 8, 1933, correcting the judgment theretofore rendered and entered in Cause No. L-844-Phoenix,

so as to provide that the amount of the attorneys' fees recoverable from defendant Southrn Pacific Company should be $334.31, instead of $359.98.

Within the time allowed by law, as extended by stipulation of the parties, and by order of the Court, this Bill of Exceptions was served on counsel for the plaintiffs and was filed herein.

It is hereby certified that the foregoing Bill of Exceptions tendered by the defendants is complete and correct in every particular, and contains all of the evidence and testimony offered and/or admitted upon proceedings had at any and all hearings in the above entitled causes, together with all of the rulings of the Court in said proceedings, and all of the exceptions allowed; and

Said Bill of Exceptions is hereby certified, settled, and signed as correct in all respects and presented in due time this 9th day of October, 1933.

F. C. JACOBS,
United States District Judge. [267]

STIPULATION

IT IS HEREBY STIPULATED, by and between counsel for the parties to the above-entitled causes, that the foregoing Bill of Exceptions, as tendered to the Court by defendants, was presented in time, and is true and correct, and has been duly served upon the plaintiffs; and that the same may

be settled, allowed, certified and signed by the Court without amendment.

Dated at Phoenix, Arizona, this 5th day of October, 1933.

FRANK L. SNELL, JR.
SAMUEL WHITE
Counsel for Plaintiffs.
BAKER & WHITNEY
CHALMERS, FENNEMORE & NAIRN
JAMES E. LYONS
GERALD E. DUFFY
BURTON MASON
Counsel for Defendants.

[Endorsed]: Filed Oct. 9, 1933. [268]

[Title of Court and Cause—Consolidated Cases.]

MINUTE ENTRY OF MONDAY,
OCTOBER 9, 1933

Defendants' Bill of Exceptions is now presented to the Court by Alexander B. Baker, Esquire, of counsel for said Defendants, and upon stipulation of respective counsel on file herein,

IT IS ORDERED that said Defendants' Bill of Exceptions be, and the same is hereby settled and allowed. [269]

[Title of Court and Cause—No. L-738-Phx.]

PETITION FOR APPEAL.

Now comes Southern Pacific Company, a corporation, defendant in the above entitled cause, and says that on or about the 9th day of June, 1933, judgment in said cause was rendered by this Court in favor of the plaintiffs, F. J. Baffert and A. S. Leon, co-partners, trading under the firm name of Baffert & Leon, by which said defendant was aggrieved; that in said judgment, and the proceedings had prior and subsequent thereto in said cause, certain errors were committed to the prejudice of said defendant, all of which fully appears in detail from the assignments of error filed with this petition.

WHEREFORE, said defendant Southern Pacific Company, a corporation, hereby prays that an appeal may be allowed to it to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors complained of, and that citation on appeal issue as provided by law; and that a duly authenticated transcript of the record, proceedings and all papers and documents herein may be sent to the United States Circuit Court of Appeals for the Ninth Circuit pursuant to law and the rules of said court in such cases made and provided; and said defendant further prays this Court to fix the amount of the cost and/or supersedeas bond to be given by the defendant in said cause, and that such other and [270] further proceedings may be had as may be proper in the premises.

DATED at Phoenix, Arizona, this 5th day of September, 1933.

BAKER & WHITNEY,
CHALMERS, FENNEMORE & NAIRN,
JAMES E. LYONS,
GERALD E. DUFFY,
BURTON MASON,
Attorneys for Defendant and Appellant.

[Endorsed]: Filed Sep 5 1933. [271]

[Title of Court and Cause—L-844-Phx.]

PETITION FOR APPEAL

Now come Southern Pacific Company, a corporation, and Santa Maria Valley Railroad Company, a corporation, defendants in the above entitled cause, and say that on or about the 9th day of June, 1933, judgment in said cause was rendered by this Court in favor of the plaintiff, Wheeler-Perry Company, a corporation, and against said defendants, Southern Pacific Company and Santa Maria Valley Railroad Company by which said defendants were aggrieved; that in said judgment, and the proceedings had prior and subsequent thereto in said cause, certain errors were committed to the prejudice of said defendants, all of which fully appears in detail from the Assignments of Error filed with this petition.

WHEREFORE, said defendants, Southern Pacific Company, a corporation, and Santa Maria Valley Railroad Company, a corporation, hereby pray that an appeal may be allowed to them to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors complained of, and that citation on appeal issue as provided by law; and that a duly authenticated transcript of the record, proceedings and all papers and documents herein may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to law and the rules of said Court in such cases made and provided; and said defendants further pray this Court to [272] fix the amount of the cost and supersedeas bond to be given by the defendants in said cause; and that such other and further proceedings may be had as shall be proper in the premises.

Dated at Phoenix, Arizona, this 5th day of September, 1933.

BAKER & WHITNEY
CHALMERS, FENNEMORE & NAIRN
JAMES E. LYONS
GERALD E. DUFFY
BURTON MASON
Attorneys for Defendants and Appellants.

[Endorsed]: Filed Sep. 5, 1933. [273]

[Title of Court and Cause—Consolidated Cases.]

ASSIGNMENTS OF ERROR.

The defendants in the above entitled causes, Southern Pacific Company, a corporation, and

Santa Maria Valley Railroad Company, a corporation, in connection with their petitions for appeal in said causes, make the following assignments of error, which they aver occurred upon the trial of said cause, or were committed by the Court in the findings of fact, or in the conclusions of law, or in the rendition of judgments, or in other proceedings in said causes:

1.

The Court erred in failing to grant, and in overruling, defendants' motion for the entry of an order for a non-suit against the plaintiffs in each of said causes, and for the entry of orders dismissing the complaints of said plaintiffs, and for judgments against said plaintiffs and in favor of defendants, made at the conclusion of plaintiffs' testimony in chief; for the reason that plaintiffs' said testimony failed to sustain the causes of action alleged in the complaints, or any cause of action against the de- [274] fendants, and showed affirmatively that the orders for reparation, upon which said complaints are based, were and are void and of no effect, because beyond the power and jurisdiction of the Interstate Commerce Commission, in that the rates assessed upon said shipments, against which said Commission has undertaken by means of said orders to award reparation, had previously been approved and/or prescribed as reasonable by said Commission by prior formal findings, and/or were less in amounts than rates so approved or prescribed, as continued in effect throughout the period of move-

ment of plaintiffs' shipments without any change, on the part of the defendant carriers, other than certain voluntary reductions.

2.

The Court erred in failing to sustain, and in overruling defendants' objection to the question, asked of defendants' witness Fielding, on cross-examination by plaintiffs' attorney, as follows: "In attempting to reach reasonable rates for Arizona, has it not been the contention of the carriers that our rates here should be 120 per cent of the Memphis Southwestern rates?", upon the ground that said question was immaterial and irrelevant, and wholly improper cross-examination, having no relation to the issues, or to the testimony of said witness upon his direct-examination.

3.

The Court erred in overruling, and in failing to sustain, defendants' objection to plaintiffs' Exhibit 5, offered through plaintiffs' witness L. G. Reif, testifying in rebuttal, upon the ground that said exhibit was not and is not proper rebuttal, in that the same was not offered in rebuttal of any testimony introduced by defendants in their case in chief, and did not undertake to deal with any testimony offered by defendants' witness, or any showing made in defendants' exhibits. Plaintiffs' Exhibit 5 was and is, in words and figures, as follows: [275]

Plaintiffs Exhibit no. 5.

TO	(a) Average Distance	1 Rates Charged	2 Memphis-Southwestern Sugar Rates	3 120 Per Cent Memphis-Southwestern Sugar Rates	4 Rates Prescribed for Reparation Period	5 120 Per Cent Consolidated Southwestern Sugar Rates	6 Rates Prescribed for Future	7 Arbitraries	8 Rates in Column 3 Plus Arbitraries	9 Rates Prescribed for Reparation Period	10 Rates in Column 5 Plus Arbitraries	11 Rates Prescribed for Future
	(Miles)		(Cents)	(Cents)	(Cents)	(Cents)	(Cents)	(Cents)	(Cents)	(Cents)	(Cents)	(Cents)
FROM SOUTHERN CALIFORNIA GROUP												
Group 1-												
Yuma	267	SEE RULE 37	40	48	66	45½	46	20	68	66	65½	66
Group 2-												
Kingman	388		47	56	68	56½	57	12	68	69	68½	69
Group 4-												
Tucson												
Prescott	539		55	66	73	65	65	12	78	77	77	77
Williams												
Flagstaff												
Group 5-												
Winslow												
Bisbee												
Bowie	635		59	71	75	72	72	12	83	84	84	84
Douglas												
Holbrook												
Group 6-												
Safford	674		60	72	77	74½	75	12	84	87	86½	87
Group 7-												
Gallup												
Clifton	752		64	77	79	79	79	10	87	89	89	89
Globe												

REFERENCES

Column 1 See Rule V Statements (or reparation claims).
2 For rates see 77 I.C.C. 595.
3 Rates shown in 77 I.C.C. 595 plus 20 per cent.
4 140 I.C.C. 180
5 Rates shown in 123 I.C.C. 452, 477 plus 20 per cent.
6 140 I.C.C. 181.
7 Arbitraries added by Commission to the rates from Southern California Groups to make the through rates from Northern California Groups, 140 I.C.C. 181.
8 Memphis-Southwestern sugar rates plus 20 per cent plus arbitraries.
9 140 I.C.C. 180.
10 Consolidated Southwestern sugar rates plus 20 per cent plus arbitraries.
11 140 I.C.C. 181.
(a) See Docket 16742, 140 I.C.C. 171, at 178.

4.

The Court erred in overruling, and in failing to grant, defendants' motion to strike plaintiffs' Exhibit 5 from the record, upon the ground that the same was incompetent, in that it appeared from the admissions of Witness L. G. Reif, through whom the same was offered, that it had not been prepared by said witness or at his direction; and upon the further ground that said exhibit was admittedly predicated upon the assumption of facts not in evidence, and upon assumptions shown to be contrary to the undisputed evidence; and upon the further ground that said exhibit was not proper rebuttal, and not offered in rebuttal of any testimony offered by defendants in their case in chief.

5.

The Court erred in denying, and in failing to grant, defendants' motion, made at the conclusion of the testimony, for the rendition and entry of judgments in favor of defendants, and against the plaintiffs, based upon the pleadings and the evidence, for the reason that said judgments in favor of defendants were and are justified and sustained by all the evidence, and justified and required by the law.

6.

The Court erred in finding and concluding that reasonable sums to be allowed as the fees of plaintiffs' attorneys and counsel, on account of their services rendered in these causes, should be 20 per cent

of the total amounts recovered, and in rendering and entering its order allowing to plaintiffs' attorneys and counsel such fees of 20 per cent of the total amounts recovered; for the reason that the said finding, conclusion and order, and each of them, are not sustained or supported by the evidence, and are contrary to the evidence and the law, particularly in that said amounts so found by the Court to be reasonable as attorneys' fees are so clearly too large, in view of the services rendered, as to amount to an abuse [278] by the Court of its discretion.

7.

The Court erred in refusing to find the following facts, which were requested by defendants, to-wit:

> 5. Thereafter, under date of March 12, 1928, said Commission made and entered its report and order in said Dockets Nos. 16770, Sub-No. 2, and 17549, Sub-No. 1, and associated cases (including a proceeding known as Docket No. 16742) decided concurrently therewith, which said report of the Commission is contained in its official reports: 140 I. C. C., at pp. 171 and following. A true and correct copy of said report and order is annexed to the complaint on file in Cause No. L-738-Phoenix, and marked Exhibit "A". Reference is hereby made to said report for further particulars.

said requested findings being contained in paragraph 5 of defendants' proposed special findings of fact, for the reason that said proposed findings so re-

quested by defendants were conclusively proven by the uncontradicted evidence and were and are material to the issues in these causes.

8.

The Court erred in refusing to find the following facts, which were requested by defendants, to-wit:

> 6. Thereafter, pursuant to said report, and in accordance with Rule V of the Rules of Practice of said Commission, plaintiffs prepared the Rule V statements showing the shipments upon which reparation was claimed, copies of which said Rule V statements are attached to the complaints on file herein, as heretofore set forth.

said requested findings being contained in paragraph 6 of defendants' proposed special findings of fact, for the reason that said proposed findings so requested by defendants were conclusively [279] proven by the uncontradicted evidence and were and are material to the issues in these causes.

9.

The Court erred in refusing to find the following facts, which were requested by defendants, to-wit:

> 7. Thereafter, under date of September 7, 1929, said Commission made and entered its order directing and requiring defendant Southern Pacific Company to pay to plaintiffs Baffert and Leon, on or before October 22, 1929, as

reparation and damages, the amount set opposite the name of said defendant in said order, with interest thereon at the rate of 6 per cent per annum from the respective dates of payment of charges as shown in said Rule V statement annexed as Exhibit "B" to the complaint on file in Cause No. L-738-Phoenix, as heretofore referred to. A copy of said reparation order is annexed as Exhibit "C" to said complaint in Cause No. L-738-Phoenix, and is hereby referred to for further particulars.

Thereafter, under date of April 13th, 1930, said Commission made and entered its order directing and requiring said defendants therein named to pay to plaintiff Wheeler-Perry Company, on or before the 28th day of May, 1930, as reparation and damages, the amounts set opposite their respective names in said order, with interest thereon at the rate of 6 per cent per annum from the respective dates of the payment of charges as shown in said Rule V statement annexed as Exhibit "A" to the complaint in Cause No. L-844-Phoenix, as heretofore referred to. A copy of said reparation order is annexed as Exhibit "B" to the complaint in Cause L-844-Phoenix, and is hereby referred to for further particulars.

said requested findings being contained in paragraph 7 of defend- [280] ants' proposed special findings of fact, for the reason that said proposed findings

so requested by defendants were conclusively proven by the uncontradicted evidence and were and are material to the issues in these causes.

10.

The Court erred in refusing to find the following facts, which were requested by defendants, to-wit:

> 9. Under date of May 25, 1915, in response to a complaint attacking as unreasonable the rates on sugar in carloads from all points in California to all destinations in Arizona (including Tucson) said Commission, after full hearing and investigation, rendered its report and order in a proceeding known and entitled as Docket No. 6806, Ariz. Corp. Comm. v. A. T. & S. F. Ry. Co., et al., 34 I. C. C. 158. Reference is hereby made to said report of said Commission, as set forth in its official reports, for further particulars.
>
> As more fully appears from said report, the complaint in said Docket No. 6806 was filed with the Commission on April 15, 1914. During the pendency of said proceeding the carriers named as defendants therein voluntarily reduced their rates on sugar from all points of origin in California to substantially all destinations in Arizona, including Tucson. Such voluntary reductions included in particular the establishment of rates on sugar, in carloads, from all said points in California to all said destinations in Arizona, subject to a minimum weight of 60,000 pounds

per car, which rates were in all cases less than the rates theretofore applying from and to the same points in connection with a carload minimum weight of 36,000 pounds. In and by its said report in said Docket No. 6806, said Commission duly found, among other things, that the rates on sugar to [281] Tucson, as voluntarily reduced during the pendency of said proceeding, were and in future would be just and reasonable. No order respecting said rates to Tucson was made by said Commission in said Docket No. 6806.

The character and extent of said reductions, and in particular of the reductions in the rates to Tucson, is set forth in said report in said Docket No. 6806.

said requested findings being contained in paragraph 9 of defendants' proposed special findings of fact, for the reason that said proposed findings so requested by defendants were conclusively proven by the uncontradicted evidence and were and are material to the issues in these causes.

11.

The Court erred in refusing to find the following facts, which were requested by defendants, to-wit:

10. In compliance with the Commission's said findings in said Docket No. 6806 the carriers parties to the rates therein involved continued, until and including December 29, 1917,

the rates on sugar in carloads, from the several points in California to the destination in Arizona involved in this cause, which were in effect on said May 25, 1915. Upon said December 29, 1917, possession, control and operation of the railroad properties of the defendants and generally of all other railroad common carriers throughout the United States were assumed by the Director-General of Railroads, as Agent of the President of the United States; and said Director-General continued in such possession, control and operation until and including February 29, 1920. Said rates heretofore last mentioned were continued in effect by said Director-General, from and after said December 29, 1917, until, but not including, June 25, 1918. On June 25, 1918, said Director-General caused said rates [282] to be increased as specified and provided in General Order No. 28, issued by said Director-General pursuant to authority conferred by the Federal Control Act, 40 Stat. L. 456. Upon November 25, 1919, said rates, as modified by the changes made pursuant to said General Order No. 28, were further modified pursuant to and as provided by an order duly issued by said Director-General, styled "Freight Rate Authority No. 8016, dated May 16, 1919". Said order last mentioned, also issued pursuant to authority duly conferred by said Federal Control Act, brought about a general readjustment of rates on sugar throughout the western part of the United States. On February 29, 1920,

said Director-General, by order duly made, further modified said rates heretofore mentioned by canceling the rate from California points to Tucson, then and theretofore in effect, subject to a carload minimum weight of 36,000 pounds. The rate then and theretofore in effect from and to said points, subject to a carload minimum weight of 60,000 pounds, was continued without further modification until, but not including, August 26, 1920.

said requested findings being contained in paragraph 10 of defendants' proposed special findings of fact, for the reason that said proposed findings so requested by defendants were conclusively proven by the uncontradicted evidence and were and are material to the issues in these causes.

12.

The Court erred in refusing to find the following facts, which were requested by defendants, to-wit:

11. On March 1st, 1920, upon the termination of Federal Control, the several defendants and other carriers resumed possession and control of their railroad properties. Said [283] carriers, parties to the rates on sugar from California points to Tucson, maintained from and after said last mentioned date until, but not including, August 26, 1920, said rate on sugar subject to a carload minimum weight of 60,000 pounds which was in effect from and to said

points at the date of termination of Federal control. On said date last mentioned said rate was increased to 96½ cents per hundred pounds, as authorized by the report and order of said Commission in the proceeding entitled Ex Parte 74, Increased Rates 1920, 58 I. C. C. 220, to which report reference is hereby made for further particulars. Said report and order authorized general percentage advances in interstate freight rates throughout the United States.

said requested findings being contained in paragraph 11 of defendants' proposed special findings of fact, for the reason that said proposed findings so requested by defendants were conclusively proven by the uncontradicted evidence and were and are material to the issues in these causes.

13.

The Court erred in refusing to find the following facts, which were requested by defendants, to-wit:

12. Said rate of 96½ cents as made effective August 26, 1920, was voluntarily reduced by said defendants, on July 27, 1921, to 96 cents; and was further voluntarily reduced by said defendants effective July 1st, 1922, to 86½ cents. Said reduction last mentioned was in conformity with the recommendations made by said Commission in its report in a proceeding entitled: Reduced Rates 1922, 68 I. C. C. 676, to which report reference is hereby made for further particulars.

> Said rate of 86½ cents last mentioned was further voluntarily reduced by said defendants on or about January [284] 11, 1924, to 84 cents. Said rate of 84 cents continued in effect until and including October 27, 1925, upon which date the same was reduced to 75 cents, pursuant to the findings and order of said Commission in a proceeding numbered and entitled Docket No. 14140, Solomon-Wickersham Co. v. S. M. V. R. Co., 101 I. C. C. 667, to which report reference is hereby made for further particulars. Said rate of 75 cents remained in effect until, but not including, June 11, 1928, upon which date the same was reduced to 65 cents per hundred pounds from points in southern California, including Betteravia and Oxnard, and advanced to 77 cents per hundred pounds from points in northern California, including San Francisco and Crockett, pursuant to the findings and order of said Commission in said Docket No. 16742, heretofore referred to. Said rates of 86½ cents, 84 cents and 75 cents, which were successively in effect during the period July 1, 1922, to June 10, 1928, both inclusive, were the rates assessed upon plaintiffs' shipments during the period of movement thereof, as shown upon said Rule V statements annexed to the complaints on file herein, and are the rates referred to "As Charged" upon said statements.

said requested findings being contained in paragraph 12 of defendants' proposed special findings of fact,

for the reason that said proposed findings so requested by defendants were conclusively proven by the uncontradicted evidence and were and are material to the issues in these causes.

14.

The Court erred in refusing to find the following facts, which were requested by defendants, to-wit:

> 13. On or about the 22nd day of June, 1921, and after full hearing and investigation, said Commission rendered [285] its report and order in a proceeding entitled Docket No. 11532, Traffic Bureau, Phoenix Chamber of Commerce, et al. v. Director-General, et al., 62 I. C. C. 412 (to which report reference is hereby made for further particulars) wherein and whereby said Commission found, among other things, that the reasonable rate thereafter be applied to the transportation of sugar in carloads, minimum weight 60,000 pounds, from points of origin in California (including the points of origin of the plaintiffs' shipments involved herein) to Phoenix, Arizona, should not exceed 96½ cents per hundred pounds. The usual and customary routes of movement from said points of origin in California to Phoenix, Arizona, were identical with the corresponding routes of movement of shipments from said points to Tucson, Arizona, as far as and including Maricopa, Arizona, a point 35 miles by rail from Phoenix; and the distance over said routes of movement

> from said points of origin in California to Phoenix were at all times, during the period of movement of the plaintiffs' shipments involved herein, 51 miles less than the corresponding distances from said points of origin to Tucson. Said order of said Commission in said proceeding last-mentioned, Docket No. 11532, specified that said rate of 96½ cents should be observed as the reasonable maximum rate from California points to Phoenix until the further order of said Commission; and no further order with respect to said rate was made by said Commission during the period of movement of the plaintiffs' shipments, or until January 6, 1925, effective February 25, 1925. During all of said period, and prior to February 25, 1925, said rate of 96½ cents was, and continued to be, the duly established and conclusive measure of a just and reasonable rate on sugar [286] from the points of origin in California involved herein to Phoenix and related points in Arizona, including Tucson in particular.

said requested findings being contained in paragraph 13 of defendants' proposed special findings of fact, for the reason that said proposed findings so requested by defendants were conclusively proven by the uncontradicted evidence and were and are material to the issues in these causes.

15.

The Court erred in refusing to find the following facts, which were requested by defendants, to-wit:

14. On November 3, 1921, and after full hearing, said Commission rendered its report and order in a proceeding entitled Docket No. 11442, Traffic Bureau, Douglas Chamber of Commerce & Mines v. A. T. & S. F. Ry. Co., et al., 64 I. C. C. 405 (to which report of said Commission reference is hereby made for further particulars), in response to a complaint alleging, among other things, that the rates on sugar in carloads from points in California, including all of the points of origin of plaintiffs' said shipments, to Douglas, Arizona, were unreasonable and otherwise in violation of the Interstate Commerce Act. In said report said Commission found that said rate, which at the date of said complaint was 96½ cents per hundred pounds, was and in future would be not unreasonable. No further findings or order with respect to said rate on sugar to Douglas were made by said Commission, subsequent to the report in said Docket No. 11442, until March 12, 1928, the date of the findings and order in said Docket No. 16742 and associated cases, to which reference has heretofore been made. The direct and customary routes of movement of the shipments of the plaintiffs from points [287] in California to Tucson, Arizona, during all of the period of the movement thereof, were identical with the corresponding routes over which shipments of sugar moved from said points in California to Douglas, Arizona, so far as and including Tuc-

son itself; and the distances from said points of origin in California to Douglas, Arizona, were, during all of said times, 123 miles greater than the corresponding distances from said points of origin to Tucson. During all of the period of movement of the plaintiffs' shipments, said rate of 96½ cents to Douglas, found reasonable by said Commission in its report in said Docket No. 11442, was and continued to be the duly established and conclusive measure of a reasonable rate for the transportation of shipments of sugar from the points of origin of plaintiffs' shipments to Douglas and related destinations in Arizona, including Tucson.

said requested findings being contained in paragraph 14 of defendants' proposed special findings of fact, for the reason that said proposed findings so requested by defendants were conclusively proven by the uncontradicted evidence and were and are material to the issues in these causes.

16.

The Court erred in refusing to find the following facts, which were requested by defendants, to-wit:

15. On June 27, 1923, after full hearing and investigation, and in response to a complaint alleging, among other things, that the rates on sugar, in carloads, from points in California, including the points of origin of plaintiffs' shipments, to destinations in Arizona on the Globe Division of the Arizona Eastern Railroad Company (now the Globe Branch of the South-

ern Pacific Company) were unreasonable and otherwise in violation of the Interstate Commerce Act, said [288] Commission rendered its report and order in a proceeding entitled Docket No. 13139: Graham & Gila Counties Traffic Assn. v. A. E. R. Co., et al., 81 I. C. C. 134. In said report said Commission found and declared that said rates, as in effect on January 18, 1922, were and in future would be not unreasonable; and reference is hereby made to said report for further particulars. On said date, January 18, 1922, the rate on sugar from the points of origin of the plaintiffs' shipments to Globe, Arizona, was $1.59 per hundred pounds; the corresponding rate on sugar from said points of origin to Safford, Arizona, was $1.29 per hundred pounds; both said points, Globe and Safford, being located upon said Globe Division, heretofore referred to. The direct short-line routes of movement from the California points of origin of the plaintiffs' shipments to Globe and Safford, were, at all times during the period of movement of the plaintiffs' shipments, identical with the routes of movement from said points of origin to Tucson, as far as and including Tucson itself. At all said times the distances from said points of origin to Globe and Safford were, respectively, 237 miles, and 153 miles, greater than to Tucson.

said requested findings being contained in paragraph 15 of defendants' proposed special findings of fact,

for the reason that said proposed findings so requested by defendants were conclusively proven by the uncontradicted evidence and were and are material to the issues in these causes.

17.

The Court erred in refusing to find the following facts, which were requested by defendants, to-wit:

> 16. The rates and charges assessed and collected upon the plaintiffs' said shipments, as set forth upon the [289] aforesaid Rule V statements were, and each of them was, just and reasonable, and in full conformity with the Interstate Commerce Act, and were, and each of them was, lawfully applied, assessed and collected by the said defendants.

said requested findings being contained in paragraph 16 of defendants' proposed special findings of fact, for the reason that said proposed findings so requested by defendants were conclusively proven by the uncontradicted evidence and were and are material to the issues in these causes.

18.

The Court erred in finding the following facts, which were requested by plaintiffs, to-wit:

> V.
>
> That the Interstate Commerce Commission on March 12, 1928, made and rendered its opinion and order, reported in volume 140 of Interstate

Commerce Commission Reports, at page 171 and following, and finding that the rates on sugar in carloads from Betteravia and Oxnard, California, had in the past been unreasonable to the extent that they exceeded a rate and charge of 75¢ per 100 pounds on and after July 1, 1922, and from Crockett and San Francisco, California, had in the past been unreasonable to the extent that they exceeded a rate and charge of 77¢ per 100 pounds on and after July 1, 1922, and that certain of the plaintiffs in said proceedings (including plaintiffs herein) had made shipments at the rates found in said proceeding to have been unreasonable; that they had paid and borne the charges thereon, and were damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the rates found in said proceedings to have been reasonable; and that said complainants (in- [290] cluding plaintiffs herein) were entitled to reparation, with interest. Said list of shipments set forth as Exhibit "B" in the complaint on file in cause No. L-738-Phoenix and Exhibit "A" in the complaint on file in cause No. L-844-Phoenix, show in detail, as previously stated, the charges actually assessed upon plaintiff's shipments involved in these causes, and the charges which would have accrued thereon upon the basis of the rates declared by said Commission in said above men-

> tioned report and order to have been the reasonable rates to have been applied at said dates of movement, together with the difference between the charges so assessed and those which would have accrued, which said last mentioned differences constitute the amounts herein claimed by the plaintiffs, exclusive of interest and fees of its attorneys and counsel.

which are contained in paragraph V of findings of fact adopted by the Court, for the reason that the same were and are not sufficiently clear and definite, and were and are not sustained or supported by the evidence, nor in accord with the evidence and the law.

19.

The Court erred in finding the following facts, which were requested by plaintiffs, to-wit:

VI.

> That said freight charges assessed the respective plaintiffs in the above entitled causes on the list of shipments set forth in said Rule V statements hereinabove referred to, same being the shipments involved in these causes, were and are unreasonable as to the plaintiffs and in violation of the Interstate Commerce Commission Act of February 4, 1887, and acts of Congress amendatory thereto.

which are contained in paragraph VI of findings of fact adopted by [291] the Court for the reason that

there is no competent evidence to sustain such findings and the same are not supported by, and are contrary to, the evidence and the law; it having been affirmatively shown, by uncontradicted testimony introduced by defendants, that the charges assessed and collected upon plaintiffs' said shipments were just, reasonable and lawful, and were in fact less in amount than charges which would have accrued under rates which had previously been declared to be just and reasonable by prior valid formal findings of said Interstate Commerce Commission, which rates as so approved had been continued in effect throughout the period of movement of plaintiffs' shipments, subject only to changes authorized and/or required by the United States acting through the Director-General of Railroads and/or said Commission, and to certain incidental voluntary reductions by defendants.

20.

The Court erred in finding the following facts, which were requested by the plaintiffs, to-wit:

VII.

That the just and reasonable rates which should have been charged on all of said shipments listed in said Rule V statements above referred to from Betteravia and Oxnard, California, to said points of destination in Arizona after the 1st day of July, 1922, was 73¢ per 100 pounds, and from Crockett and San Francisco,

California, to said point of destination in Arizona after the 1st day of July, 1922, was 77¢ per 100 pounds.

which are contained in paragraph VII of findings of fact adopted by the Court, for the reason that the same are not sustained or supported by competent evidence, and are contrary to the evidence and the law, and are not sufficiently clear and definite; there being no competent evidence whatsoever upon which to base such finding. [292]

21.

The Court erred in finding the following facts, which were requested by plaintiffs, to-wit:

VIII.

That the plaintiffs did duly comply with all of the requirements of the Interstate Commerce Commission as to the proof necessary for the amount of said reparation.

which are contained in paragraph VIII of findings of fact adopted by the Court, for the reason that the same are not sustained or supported by the evidence, and are contrary to the evidence and the law, and for the further reason that the same are not sufficiently clear and definite.

22.

The Court erred in finding the following facts, which were requested by the plaintiffs, to-wit:

IX.

(1) That on the 7th day of September, 1929, said Interstate Commerce Commission, in Docket No. 16742 and causes consolidated therewith, including Docket No. 17549 (Sub-No. 1) duly made and passed its order directing and requiring the defendant Southern Pacific Company to pay to the plaintiffs F. J. Baffert and A. S. Leon, copartners, trading under the firm name of Baffert and Leon (being plaintiff in cause No. L-738-Phoenix, above referred to), the sum of $726.28, together with interest thereon at the rate of six percent (6%) per annum from the respective dates of payment of the charges collected by the defendant from said plaintiffs, said sum to be paid on or before the 22nd day of October, 1929; said sum being the amount of reparation on account of said unreasonable rates charged and collected by said defendant for transportation of said 18 car load shipments of sugar. [293]

(2) That heretofore and on the 13th day of April, 1931, the Interstate Commerce Commission duly made and rendered its Supplemental Order in Docket No. 16742 and causes consolidated therewith, including said Docket No. 16770 (subdivision No. 2), ordering and directing the defendants to pay unto the plaintiff Wheeler-Perry Company (being plaintiff in

cause No. L-844-Phoenix above referred to) the following sums, to-wit:

Santa Maria Valley Railroad Company	$ 81.60
Southern Pacific Company	1090.09
	$1171.69

together with interest thereon at the rate of six percent (6%) per annum from the respective dates of the payment of the charges as shown on said list of shipments above referred to and specifically set forth on Exhibit "A" attached to said plaintiff's complaint filed in this cause.

Said last mentioned order required the payment of said sums on or before the 28th day of May, 1931; and that the same were as reparation on account of the unreasonable rates charged for the transportation of certain carload shipments of sugar from points in California to points in Arizona (including Tucson, Arizona).

which are contained in sub-paragraphs (1) and (2) of paragraph IX of findings of fact adopted by the Court, for the reason that said findings are not sustained or supported by the record or the evidence, and are contrary to the evidence and the law, and for the further reason that the same are not sufficiently clear, definite and concise.

23.

The Court erred in finding the following facts, which were requested by plaintiffs, to-wit: [294]

X.

That by reason of said unreasonable rates, charges and payments thereof by the respective plaintiffs, and by reason of the refusal of the defendants to pay said reparations so ordered by the Interstate Commerce Commission, the plaintiffs have been damaged as follows, to-wit:

(1) F. J. Baffert and A. S. Leon, copartners, trading under the firm name of Baffert and Leon (being plaintiffs in cause No. L-738-Phoenix), $726.28, together with interest thereon at the rate of six percent (6%) per annum from the respective dates of payment on the charges collected by the defendant Southern Pacific Company down to and including the 22nd day of October, 1929, amounting to the sum of $191.95, together with interest at the rate of six percent (6%) per annum on the total sum of principal and interest, to-wit, $918.23, from the 22nd day of October, 1929, until paid;

(2) Wheeler-Perry Company (being plaintiff in cause No. L-844-Phoenix) by the defendant Santa Maria Valley Railroad Company in the sum of $81.60, and by the defendant Southern Pacific Company in the sum of $1090.09, together with interest on all of said amounts at the rate of six percent (6%) per annum from the respective dates of payment as shown on Exhibit "A" attached to said plaintiff's complaint.

which are contained in paragraph X of findings of fact adopted by the Court, for the reason that such

findings are not sustained or supported by the evidence, and are contrary to the evidence and the law, in that there is no competent evidence to show that any unreasonable rates and/or charges were ever collected by defendants from plaintiffs, or paid by plaintiffs, or either of them, to defendants, or any of them, or that any of the defendants have ever [295] refused to pay any reparation properly and lawfully awarded by said Interstate Commerce Commission to plaintiffs, or that plaintiffs have ever been damaged by reason of the collection of the rates and charges referred to in the complaints herein.

24.

The Court erred in finding the following facts, which were requested by the plaintiffs, to-wit:

XI.

> That the plaintiffs were required to employ attorneys at law to prosecute the present actions in order to effect collection of said reparations, and that tweny percent (20%) of the total respective amounts due, including interest and principal, in each of said causes, is reasonable as attorneys fees.

which are contained in paragraph XI of findings of fact adopted by the Court, for the reasons that such findings are not sustained or supported by the evidence and are contrary to the evidence and the law; and for the further reason that the amounts so found by the Court to be reasonable as attorneys'

fees in these causes are so clearly too large, in view of the services renderd, as to amount to an abuse of discretion by the Court.

25.

The Court erred in making the following conclusion of law, which was requested by plaintiffs, to-wit:

I.

That the said order of the Interstate Commerce Commission dated September 7, 1929 (being the Order relied upon by plaintiffs in cause No. L-738-Phoenix above referred to) and the Order of the Interstate Commerce Commission dated April 13, 1931 (being the Order relied upon by plaintiff in cause No. L-844-Phoenix above referred to), both of which said orders were made and entered in that [296] certain proceeding before said Commission entitled "Traffic Bureau of Phoenix Chamber of Commerce, et al, v. Atchison, Topeka and Santa Fe Railway Company, et al", docketed as No. 16742, and causes consolidated therewith (including Docket No. 17549, Sub-No. 1, and Docket No. 16770), which said order required said defendants to pay the various plaintiffs herein certain sums of money as set forth in said orders and in the respective plaintiffs' complaints, were and are legal, valid and binding orders, and were made and ordered by said

> Interstate Commerce Commission in said cause, and were within the power and jurisdiction conferred upon said Interstate Commerce Commission by law, and that in the making of said orders the said Interstate Commerce Commission acted within its jurisdiction and power.

which is contained in paragraph I of the conclusions of law adopted by the Court, for the reason that such conclusion is not sustained or supported by competent evidence, and is contrary to the evidence and the law, in that the evidence shows without conflict that said purported orders of said Commission, dated September 7, 1929, and April 13, 1931, respectively, undertake to require defendants to pay reparation for the collection of rates and charges which were in all respects just, reasonable and lawful, and duly and lawfully published and assessed in conformity with prior valid findings made by said Commission, and were less in amount than rates previously prescribed and/or approved as reasonable by said Commission, which were continued and maintained throughout the period of movement of plaintiffs' shipments, subject only to intervening modifications made by authority of the Director-General of Railroads as Agent of the President of the United States, and/or of said Commission.

26.

The Court erred in making the following conclusion of law, [297] which was requested by plaintiffs, to-wit:

II.

That the following rates charged the various plaintiffs by the defendants, to-wit:

For a shipment made on September 14, 1923, from Betteravia, California, 86½¢ per 100 pounds;

For a shipment made on October 13, 1923, as shown on Exhibit "A" attached to plaintiff's complaint in cause No. L-844-Phoenix, and made a part thereof, 86½¢ per 100 pounds;

For a shipment made on April 28, 1928, as shown on Exhibit "A" attached to plaintiff's complaint in cause No. L-844-Phoenix, and made a part thereof, 75¢ per 100 pounds;

For shipments made between February 27, 1923, and December 28, 1932, inclusive, from Crockett and San Francisco, California, 86½¢ per 100 pounds;

For shipments made between January 24, 1924 and September 10, 1925, inclusive, from Crockett and San Francisco, California, 84¢ per 100 pounds;

on carload shipments of sugar, all as shown on the Rule V statements hereinabove referred to and attached to plaintiff's complaint of the respective plaintiffs herein, were, as found by the Interstate Commerce Commission in said proceedings known as Docket No. 16742, unreasonable to the extent that they exceeded 73¢ per

100 pounds from Betteravia and Oxnard, California, and 77¢ per 100 pounds from Crockett and San Francisco, California, to Tucson, Arizona, during the periods hereinabove set forth; and that the reasonable rates which should have been charged the plaintiffs on account of said shipments over defendant's lines during said periods were 73¢ per 100 pounds from Betteravia and [298] Oxnard, California, and 77¢ per 100 pounds from Crockett and San Francisco, California, to Tucson, Arizona.

which is contained in paragraph II of conclusions of law adopted by the Court, for the reason that such conclusion is not sustained or supported by the evidence and is contrary to the evidence and the law, and for the reasons hereinbefore assigned in connection with Assignments of Error Nos. 19, 23 and 25.

27.

The Court erred in making the following conclusion of law, which was requested by plaintiffs, to-wit:

III.

(1) That by reason of said unreasonable charges the plaintiffs Baffert and Leon (being plaintiffs in cause No. L-738-Phoenix) have been damaged, and the defendant Southern Pacific Company is indebted to the said plaintiffs in the sum of $726.28, together with interest thereon at the rate of six percent (6%) per annum from

the respective dates of payment of said charges, as shown on said Exhibit "B", attached to said plaintiffs' complaint down to and including the 22nd day of October, 1929, amounting to the sum of $191.95, and interest on said total sum of principal and interest, to-wit: $918.23, from said 22nd day of October, 1929, to date, said principal and interest amounting to the sum of $1114.10 as of this date, and the further sum of twenty percent (20%) of the total amount of said indebtedness, including principal and interest, as and for attorney's fees, amounting to the sum of $222.82, and said defendant became and is indebted to the said plaintiffs in said total sum of principal and interest, and attorney's fees of $1336.92, together with said plaintiffs' costs and disbursements herein expended, and that said plaintiffs are entitled [299] to judgment therefor;

(2) That by reason of said unreasonable charges the plaintiff Wheeler-Perry Company (being plaintiff in cause No. L-844-Phoenix) has been damaged, and the defendant Santa Maria Valley Railroad Company is indebted to the said plaintiff in the sum of $81.60 principal, together with interest at the rate of six percent (6%) per annum from the respective dates of payment of the charges as shown on the list of shipments set forth in Exhibit "A" attached to said plaintiff's complaint, said interest amounting to the sum of $46.74 as of this date, and at-

> torneys fees of twenty percent (20%) of the total amount of said indebtedness, including principal and interest, said attorneys fees amounting to the sum of $25.68; and the defendant Southern Pacific Company is indebted to the said plaintiff in the sum of $1090.09, together with interest at the rate of six percent (6%) per annum from the respective dates of payment of the charges as shown on the list of shipments set forth in Exhibit "A" attached to said plaintiff's complaint, said interest amounting to the sum of $581.48 as of this date, and attorneys fees of twenty percent (20%) of the total amount of said indebtedness, including principal and interest, said attorneys fees amounting to the sum of $359.98; together with other lawful costs incurred by said plaintiff in said action; and that the said plaintiff is entitled to judgment therefor.

which is contained in paragraph III of conclusions of law adopted by the Court, for the reason that such conclusion is not sustained or supported by the evidence and is contrary to the evidence and the law, and for the further reason hereinbefore assigned in connection with Assignments of Error Nos. 19, 23, 25 and 26. [300]

28.

The Court erred in failing and refusing to make the following conclusion of law, which was requested by defendants, as paragraph 1 of their requested

conclusions of law, to-wit:

> 1. The rates and charges assessed and collected upon plaintiffs' said shipments of sugar, as shown and set forth in said Rule V statements annexed to the complaints herein, were published, applied and collected by authority of the Interstate Commerce Commission, and had previously been declared by said Commission to be not unreasonable, after full formal investigation, and/or were less in amount than rates which had previously been declared by said Commission to be reasonable after such investigation, subject only to intervening modifications authorized and/or required by the United States, acting through the Director-General, as the Agent of the President, and/or the Interstate Commerce Commission.

for the reason that such conclusion is established by uncontradicted testimony, and conforms to and is justified and required by the evidence and the law, and is material to the issues in these causes.

29.

The Court erred in failing and refusing to make the following conclusion of law, which was requested by defendants, as paragraph 2 of their requested conclusions of law, to-wit:

> 2. Said orders of said Interstate Commerce Commission, dated September 7, 1929, and April 13, 1930, and purporting to direct and require said defendants to pay reparation to the plain-

> tiffs with respect to their said shipments shown on said Rule V statements, are in excess of the lawful jurisdiction of said Commission, and therefore were and are null and void and of no effect.

for the reason that such conclusion is established by uncontra- [301] dicted testimony, and conforms to and is justified and required by the evidence and the law, and is material to the issues in these causes.

30.

The Court erred in failing and refusing to make the following conclusion of law, which was requested by defendants, as paragraph 3 of their requested conclusions of law, to-wit:

> 3. Plaintiffs have failed to establish by the evidence any cause of action whatever against the defendants or either or any of them; and have failed to establish that any unreasonable or otherwise unlawful rate or charge was collected upon any of said shipments, or that any reparation whatsoever is due or payable with respect to said shipments or any of them.

for the reason that such conclusion is established by uncontradicted testimony, and conforms to and is justified and required by the evidence and the law, and is material to the issues in these causes.

31.

The Court erred in failing and refusing to make the following conclusion of law, which was requested

by defendants, as paragraph 4 of their requested conclusions of law, to-wit:

> 4. Plaintiffs are not entitled to recover any amount whatsoever as fees of their attorneys and counsel in said causes; defendants are entitled to judgment against the plaintiffs, that the plaintiffs take nothing by their actions, and that their complaints herein be dismissed.

for the reason that such conclusion is established by uncontradicted testimony, and conforms to and is justified and required by the evidence and the law, and is material to the issues in these causes.

32.

The Court erred in failing to render and enter judgments in favor of defendants, and against the plaintiffs, predicated upon the [302] findings of fact and conclusions of law proposed and requested by defendants, for the reason that such findings and conclusions were justified and required by all the evidence and the law, and such judgments in favor of defendants are therefore justified and required by the evidence and the law; and for the further reason hereinbefore assigned, particularly in connection with Assignments of Error Nos. 8 to 17, inclusive, and 28 to 31, inclusive.

33.

The Court erred in rendering and ordering judgments, upon the facts found, in favor of plaintiffs and against defendants, and in refusing to render

and enter such judgments in favor of defendants, for the reason that the facts as found by the Court are not sufficient to support such judgments in favor of plaintiffs; in that such judgments are based solely upon the theory that the interstate Commerce Commission, on September 7, 1929, and on April 13th, 1931, made and issued lawful, valid and binding orders authorizing and directing said defendants to pay to said plaintiffs, in accordance with the terms of said purported orders, certain sums as reparation for the collection of alleged unreasonable rates and charges upon carload shipments of sugar which moved from points in California to Tucson, Arizona, during the period from February 27, 1923, to May 1, 1928, both inclusive, whereas, the uncontradicted testimony shows that the rates and charges assessed and collected by said defendants for the transportation of said shipments were in all respects just, reasonable and lawful, and were published, applied and collected by defendants under authority of said Commission, and had previously been approved and declared by said Commission to be reasonable, after full formal investigation, and/or were less in amount than rates which had previously been approved and declared to be just and reasonable by said Commission, after such investigation, subject only to intervening modifications authorized and/or required by the United States, acting through the Director- [303] General as the Agent of the President, and/or said Commission; and said orders of said Commission purporting to award such reparation to plaintiffs are

therefore void and of no effect, because in excess of the jurisdiction conferred by law upon said Commission.

WHEREFORE, defendants pray that the judgments in the District Court in the above entitled causes may be reversed.

BAKER & WHITNEY,
JAMES E. LYONS,
BURTON MASON,
Attorneys for Defendants.

[Endorsed]: Filed Sep 5 1933. [304]

[Title of Court and Cause No. L-738-Phx.]

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF COST AND/OR SUPERSEDEAS BOND.

On the 5th day of September, 1933, the above entitled defendant, by its attorneys, filed herein and presented to this Court its petition for the allowance of an appeal in said cause, together with Assignments of Error intended to be urged by it, praying also that a duly authenticated transcript of the record, proceedings and all papers and documents upon which the judgment herein was rendered, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that citation issue; and further praying that this Court fix the amount of the cost and/or supersedeas bond to be given by said defendant in this cause; and that such other and further proceedings be had as may be proper in the premises:

NOW, THEREFORE, upon consideration thereof, this Court does hereby allow said appeal as prayed for, and does hereby fix the amount of the cost and/or supersedeas bond in the sum of Two Thousand Dollars ($2,000.00), and does hereby order that such bond shall operate as a supersedeas bond.

DATED this 5th day of September, 1933.

F. C. JACOBS
Judge of the United States District Court
for the District of Arizona.

[Endorsed]: Filed Sep 5 1933. [305]

[Title of Court and Cause L-844-Phx.]

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF COST AND/OR SUPERSEDEAS BOND

On the 5th day of September, 1933, the above entitled defendants, by their attorneys, filed herein and presented to this Court their Petition for the Allowance of an Appeal in said Cause, together with assignments of error intended to be urged by them, praying also that a duly authenticated transcript of the record, proceedings and all papers and documents upon which the judgment herein was rendered may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that citation issue; and further praying that this Court fix the amount of the cost and/or supersedeas bond to be given by said defendants in this cause; and that such other and further proceedings be had as may

be proper in the premises:

NOW, THEREFORE, upon consideration thereof, this Court does hereby allow said appeal as prayed for, and does hereby fix the amount of the cost and/or supersedeas bond in the sum of Three Thousand Dollars ($3000.00), and does hereby order that such bond shall operate as a supersedeas bond.

Dated this 5th day of September, 1933.

F. C. JACOBS
Judge of the United States District Court,
for the District of Arizona.

[Endorsed]: Filed Sep. 5, 1933. [306]

[Title of Court and Cause No. L-738-Phx.]

BOND.

KNOW ALL MEN BY THESE PRESENTS: That Southern Pacific Company, a corporation, as principal, and Pacific Indemnity Company, a corporation, as surety, are held and firmly bound unto F. S. Baffert and A. S. Leon, co-partners, trading under the firm name of Baffert & Leon, plaintiffs in the above entitled action, in the full and just sum of Two Thousand ($2000.00) Dollars, to be paid to said F. S. Baffert and A. S. Leon, co-partners, trading under the firm name of Baffert & Leon, their successors or assigns; for the payment of which sum well and truly to be made we hereby bind ourselves, our successors and assigns, jointly and severally by these presents.

Signed and sealed this 5th day of September, 1933.

The condition of this obligation is such that whereas a certain judgment and decision in the above entitled cause was rendered in favor of said plaintiffs, F. S. Baffert and A. S. Leon, co-partners, trading under the firm name of Baffert & Leon, and against said defendant, Southern Pacific Company, a corporation, on or about the 9th day of June, 1933, by the Honorable F. C. Jacobs, presiding Judge of the above entitled cause and court, and whereas, the said defendant, Southern Pacific Company, a corporation, after the entry and filing of [307] said judgment duly filed and presented to the above entitled court its petition, praying for the allowance of an appeal for the review of said judgment by the United States Circuit Court of Appeals for the Ninth Circuit, for the purpose of reversing said judgment, and said appeal was allowed by the said Honorable F. C. Jacobs, presiding Judge of the United States District Court for the District of Arizona, upon the said defendant giving bond, according to law, in the sum of Two Thousand ($2000.00) Dollars, which said bond shall operate as a supersedeas bond.

NOW, THEREFORE, if the said Southern Pacific Company, a corporation, defendant above named, shall prosecute its said appeal to effect and shall pay the amount of said judgment and answer all damages and costs if it fails to make its plea good, then the above obligation to be void, otherwise it shall remain in full force and effect.

And the said surety in this obligation hereby covenants and agrees that in case of a breach of any condition of this bond the United States District Court for the District of Arizona may, upon notice to said surety of not less than ten (10) days proceed summarily in this cause to ascertain the amount which said surety is bound to pay on account of such breach and render judgment therefor against said surety and to order execution therefor. [308]

IN WITNESS WHEREOF, the undersigned have executed this bond this said 5th day of September, 1933.

SOUTHERN PACIFIC COMPANY,
a Corporation,
[Corporate Seal]
By J. H. Dyer
Its Vice President

Attest:
G. L. KING
Its Asst. Secretary

PRINCIPAL

PACIFIC INDEMNITY COMPANY
By D. Ray Kleinman [Seal]
[Seal] Attorney-in-Fact.

SURETY.

The above bond and surety approved this 5th day of Sept., 1933.

F. C. JACOBS
Judge of the United States District Court
for the District of Arizona. [309]

[Title of Court and Cause No. L-738.]

MINUTE ENTRY OF TUESDAY, SEPTEMBER 5, 1933.

Comes now the Defendant by its counsel, Messrs. Baker and Whitney, by Alexander B. Baker, Esquire, and presents to the Courts its bond on appeal, executed on the 5th day of September, 1933, in the sum of Two Thousand Dollars ($2,000.00), with Pacific Indemnity Company, a corporation, as surety thereon, and

IT IS ORDERED that said bond be and the same is hereby accepted and approved. [312]

[Title of Court and Cause No. L-844-Phx.]

BOND

KNOW ALL MEN BY THESE PRESENTS: That Southern Pacific Company, a corporation, and Santa Maria Valley Railroad Company, a corporation, as principals, and Pacific Indemnity Company, a corporation, as surety, are held and firmly bound unto Wheeler-Perry Company, a corporation, plaintiff in the above entitled action in the full and just sum of Three Thousand ($3000.00) Dollars, to be paid to said Wheeler-Perry Company, its successors or assigns; for the payment of which sum well and truly to be made we hereby bind ourselves, our successors and assigns, jointly and severally by these presents.

Signed and sealed this 5th day of September, 1933.

The condition of this obligation is such that whereas a certain judgment and decision in the above entitled cause was rendered in favor of said plaintiff, Wheeler-Perry Company, a corporation, and against said defendants, Southern Pacific Company, a corporation, and Santa Maria Valley Railroad Company, a corporation, on or about the 9th day of June, 1933, by the Honorable F. C. Jacobs, presiding Judge of the above entitled cause and court, and whereas, the said defendants, Southern Pacific Company, a corporation, and Santa Maria Valley Railroad Company, a corporation, after the entry and filing of said [313] judgment duly filed and presented to the above entitled court their petition, praying for the allowance of an appeal for the review of said judgment by the United States Circuit Court of Appeals for the Ninth Circuit, for the purpose of reversing said judgment, and said appeal was allowed by the said Honorable F. C. Jacobs, presiding Judge of the United States District Court for the District of Arizona, upon the said defendants giving bond, according to law, in the sum of Three Thousand ($3000.00) Dollars, which said bond shall operate as a supersedeas bond.

NOW, THEREFORE, if the said Southern Pacific Company, a corporation, and Santa Maria Valley Railroad Company, a corporation, defendants above named, shall prosecute their said appeal

to effect and shall pay the amount of said judgment and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, otherwise it shall remain in full force and effect.

And the said surety in this obligation hereby covenants and agrees that in case of a breach of any condition of this bond the United States District Court for the District of Arizona may, upon notice to said surety of not less than ten (10) days proceed summarily in this cause to ascertain the amount which said surety is bound to pay on account of such breach and render judgment therefor against said surety and to order execution therefor. [314]

IN WITNESS WHEREOF, the undersigned have executed this bond this said 5th day of September, 1933.

SOUTHERN PACIFIC COMPANY,
a Corporation,
[Corporate Seal]
By J. H. Dyer,
Its Vice President

Attest:
G. L. KING
Its Assistant Secretary

SANTA MARIA VALLEY RAILROAD COMPANY, a Corporation,
[Corporate Seal]
By Raymond M. Stephens,
Its Vice President

Attest:
LEROY E. SULLIVAN,
Its Secretary

PRINCIPALS.
PACIFIC INDEMNITY COMPANY.
[Seal] By D. Ray Kleinman,
Its Attorney-in-Fact.

SURETY.

The above bond and surety approved this 5th day of Sept., 1933.

F. C. JACOBS
Judge of the United States District Court
for the District of Arizona. [315]

[Title of Court and Cause No. L-844.]

MINUTE ENTRY OF TUESDAY,
SEPTEMBER 5, 1933.

Come now the Defendants by their counsel, Messrs. Baker and Whitney, by Alexander B. Baker, Esquire, and present to the Court their bond on appeal, executed on the 5th day of September, 1933, in the sum of Three Thousand Dollars ($3,000.00) with Pacific Indemnity Company, a corporation, as surety thereon, and

IT IS ORDERED that said bond be and the same is hereby accepted and approved. [318]

[Title of Court and Cause—Consolidated Cases.]

PRAECIPE OF TRANSCRIPT OF RECORD.

To the Clerk of the above entitled Court, and to Messrs. Samuel White and F. L. Snell, Jr., attorneys for plaintiffs and appellees:

You and each of you are hereby notified that the transcript of record to be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, in connection with the appeals heretofore filed and allowed in the above entitled causes, shall contain properly certified copies of the following papers, proceedings and documents which defendants and appellants aver to be necessary to a determination of said causes in said appellate court, to-wit:

1. The summons and return in Cause No. L-738;
2. The complaint in Cause No. L-738;
3. The amended answer in Cause No. L-738;
4. The summons and return in Cause No. L-844;
5. The complaint in Cause No. L-844; [319]
6. The answer in Cause No. L-844;
7. The stipulation waiving a trial by jury in each of said causes;
8. The special findings of fact and conclusions of law requested by the plaintiffs in each of said causes;
9. The defendants' proposed amendments and additions to plaintiffs' said requested special findings of fact and conclusions of law (one document covering both causes);
10. The special findings of fact and conclusions

of law requested by defendants (one document covering both causes);

11. The special findings of fact and conclusions of law made and adopted by the Court (one document covering both causes);

12. The stipulation for the incorporation by reference, in the special findings of fact adopted by the Court, of Exhibit "B" annexed to the complaint in Cause No. L-738, and of Exhibit "A" annexed to the complaint in Cause No. L-844;

13. The judgment in said Cause No. L-738;

14. The judgment in said Cause No. L-844, as modified pursuant to stipulation of the parties, dated July 8, 1933;

15. The stipulation for the consolidation of the records in said causes (one document covering both causes);

16. The order for the consolidation of the records in said causes (one document covering both causes);

17. Plaintiffs' memorandum of costs and disbursements, together with notice of application to tax costs, filed in Cause No. L-738;

18. Defendant's exceptions and objections to plaintiffs' memorandum of costs and disbursements in Cause No. L-738;

19. Plaintiff's memorandum of costs and disbursements, together with notice of application to tax costs, filed in Cause No. L-844;

20. Defendants' exceptions to plaintiff's memorandum of costs and disbursements in Cause No. L-844; [320]

21. All minute entries of the Clerk;

22. The bill of exceptions in the consolidated causes;

23. The petition for appeal in each of said causes;

24. The assignments of error (one document covering both causes);

25. The order allowing appeal and fixing the amount of the cost and/or supersedeas bond, in each of said causes;

26. The supersedeas and appeal bond, and approval thereof, in each of said causes;

27. The citation on appeal in each of said causes;

28. This praecipe (one document covering both causes);

29. Clerk's certificate.

Dated this 6th day of September, 1933.

BAKER & WHITNEY,
CHALMERS, FENNEMORE & NAIRN,
JAMES E. LYONS,
GERALD E. DUFFY,
BURTON MASON,
Attorneys for Defendants and Appellants.

Received copy of the within Praecipe this 6th day of September, 1933.

SAMUEL WHITE,
F. L. SNELL, JR.,
ELLIOTT & SNELL,
Attorneys for Plaintiffs.

[Endorsed]: Filed Sep. 6, 1933. [321]

[Title of Court and Cause—Consolidated Cases.]

ORDER ENLARGING TIME FOR FILING AND DOCKETING IN CIRCUIT COURT OF APPEALS.

THIS MATTER coming on this 29th day of September, 1933, and it appearing that appeal has been allowed in the above cases, transferring the same to the United States Circuit Court of Appeals for the Ninth Circuit for review; and it appearing to the satisfaction of the Court that the Clerk of the above Court will be unable to complete the preparation of the transcript of record in the above cases within the thirty day period limited in the citation, and that there is good cause for enlarging and extending the time for filing and docketing the cases in the said Circuit Court of Appeals; [322]

NOW, THEREFORE, it is hereby ORDERED that the time for the filing of the records in both of the above cases, and docketing said cases in the United States Circuit Court of Appeals for the Ninth Circuit is hereby enlarged and extended to November 1, 1933.

DATED: September 29, 1933.

F. C. JACOBS,
Judge.

[Endorsed]: Filed Sep. 29, 1933. [323]

[Title of Court and Cause—Consolidated Cases.]

ORDER ENLARGING TIME FOR FILING AND DOCKETING IN CIRCUIT COURT OF APPEALS.

THIS MATTER coming on this 20th day of October, 1933, and it appearing that appeal has been allowed in the above case, transferring the same to the United States Circuit Court of Appeals for the Ninth Circuit for review; and it appearing to the satisfaction of the Court that there is good cause for enlarging and extending the time for filing and docketing the case in the said Circuit Court of Appeals;

NOW, THEREFORE, it is hereby ORDERED that the time for the filing of the record in the above case, and docketing said [324] cause in the United States Circuit Court of Appeals for the Ninth Circuit is hereby enlarged and extended to December 1, 1933.

Dated: October 20, 1933.

F. C. JACOBS,
Judge.

[Endorsed]: Filed Oct. 20, 1933. [325]

In the United States District Court for the District of Arizona.

United States of America,
District of Arizona.—ss.

I, J. Lee Baker, Clerk of the United States District Court for the District of Arizona, do hereby

certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the cases of F. J. Baffert and A. S. Leon, co-partners trading under the firm name of Baffert and Leon, Plaintiffs, versus Southern Pacific Company, a corporation, Defendant, numbered L-738-Phoenix, and Wheeler-Perry Company, a corporation, Plaintiff, versus Southern Pacific Company, a corporation, and Santa Maria Valley Railroad Company, a corporation, Defendants, numbered L-844-Phoenix, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 332, inclusive, contain a full, true and correct transcript of the proceedings of said causes and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the praecipe filed in said causes and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of $58.30 and that said sum has been paid to me by counsel for the appellants.

I further certify that the original citations issued in the said causes are hereto attached and made a part of this record.

WITNESS my hand and the Seal of the said Court this 23d day of November, 1933.

[Seal] J. LEE BAKER,
Clerk. [326]

[Title of Court and Cause No. L-738-Phx.]

CITATION ON APPEAL.

To F. J. BAFFERT and A. S. LEON, co-partners, trading under the firm name of BAFFERT & LEON, plaintiffs above named, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit in the City of San Francisco, in the State of California, within thirty (30) days from the date hereof, pursuant to an appeal and/or order allowing appeal filed in the office of the Clerk of the United States District Court for the District of Arizona, wherein Southern Pacific Company, a corporation, is appellant and you are appellees, to show cause, if any there be, why the judgment rendered against said Southern Pacific Company, a corporation, appellant as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable F. C. Jacobs, Judge of the United States District Court for the District of Arizona, this 5th day of September, 1933.

[Seal] F. C. JACOBS
Judge of the United States District Court, for the District of Arizona. [327]

Service of the within Citation on Appeal, and receipt of a copy thereof is hereby admitted this 6th day of September, 1933. Service is also admitted, and receipt is acknowledged, as of this date, of copies of Petition for Appeal, Order Allowing Appeal and Fixing Amount of Cost and/or

Supersedeas Bond, Assignments of Error, and Bond, all having to do with the above entitled and numbered cause.

SAMUEL WHITE
F. L. SNELL, JR.
Attorneys for F. J. Baffert and A. S. Leon, co-partners, trading under the firm name of Baffert & Leon, plaintiffs and Appellees.

[Endorsed]: Filed Sep. 6, 1933. [328]

[Title of Court and Cause No. L-844-Phx.]

CITATION ON APPEAL.

To Wheeler-Perry Company, a corporation, plaintiff above named, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, in the State of California, within thirty (30) days from the date hereof pursuant to an appeal, and/or order allowing appeal, filed in the office of the Clerk of the United States District Court, for the District of Arizona, wherein Southern Pacific Company, a corporation, and Santa Maria Valley Railroad Company, a corporation, are appellants, and you are appellee, to show cause, if any there by, why the judgment rendered against said Southern Pacific Company, a corporation, and Santa Maria Valley Railroad Company, a corporation, appellants as in said appeal mentioned, should not be corrected and why speedy justice should not

be done to the parties in that behalf.

WITNESS, the Honorable F. C. Jacobs, Judge of the United States District Court for the District of Arizona, this 5th day of September, 1933.

[Seal] F. C. JACOBS
Judge of the United States District Court
for the District of Arizona. [330]

Service of the within Citation on Appeal, and receipt of a copy thereof is hereby admitted this 6th day of September, 1933. Service is also admitted, and receipt is acknowledged, as of this date, of copies of Petition for Appeal, Order Allowing Appeal and Fixing Amount of Cost and/or Supersedeas Bond, Assignments of Error, and Bond, all having to do with the above entitled and numbered cause.

SAMUEL WHITE
F. L. SNELL, Jr.
Attorneys for Wheeler-Perry Company,
plaintiff and appellee.

[Endorsed]: Filed Sep. 6, 1933. [331]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7343

SOUTHERN PACIFIC COMPANY, a corporation,

Defendant and Appellant,

vs.

F. J. BAFFERT and A. S. LEON, co-partners trading under the firm name of Baffert and Leon,

Plaintiffs and Appellees.

SOUTHERN PACIFIC COMPANY, a corporation, and SANTA MARIA RAILROAD COMPANY, a corporation,

Defendants and Appellants,

vs.

WHEELER-PERRY COMPANY, a corporation,

Plaintiff and Appellee.

STATEMENT BY APPELLANTS OF PARTS OF RECORD NECESSARY TO BE PRINTED.

To HONORABLE PAUL P. O'BRIEN, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and to MESSRS. SAMUEL WHITE and F. L. SNELL, JR., Attorneys for plaintiffs and appellees:

I.

Defendants and appellants herein state that in

the review of the above causes by the United States Circuit Court of Appeals for the Ninth Circuit they intend to rely upon alleged errors committed by the trial court as follows, to wit:

1. Errors of the trial court in the admission and/or exclusion of evidence upon the trial of said causes.
2. Errors of the trial court in its findings of fact and conclusions of law.
3. Errors of the trial court in refusing to make findings of fact and conclusions of law requested by the defendants and appellants.
4. Errors of the trial court in rendering judgments in favor of the plaintiffs and appellees and against the defendants and appellants.

II.

Defendants and appellants also state that for the proper consideration of said alleged errors they think it necessary to print the following parts and portions of the transcript of record certified and filed by the Clerk of the United States District Court for Arizona with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, to wit:

All of said transcript of record, save and except the following:

The minute entries of May 29, 1933, and October 21, 1933, appearing on pages 30 and 31, respectively, of said transcript;

The findings of fact and conclusions of law proposed and requested by defendants, appearing at pages 81 to 93, inclusive, of said transcript;

The findings of fact and conclusions of law made and adopted by the trial court, appearing at pages 100 to 109, inclusive, of said transcript;

The minute entries of November 10, 1930, December 8, 1930, January 29, 1931, March 23, 1931, December 28, 1931, and February 15, 1932, appearing at pages 123 to 128, inclusive, of said transcript;

The judgment of the trial court in cause No. L-738, appearing at pages 143 and 144 of said transcript;

The minute entries of December 21, 1931, January 4, 1932, January 25, 1932, January 29, 1932, February 15, 1932, and May 14, 1932, appearing at pages 147, 148, and 150 to 153, inclusive, of said transcript;

The judgment in cause No. L-844, appearing at pages 157 and 158 of said transcript;

The power of attorney issued by Pacific Indemnity Company, surety named in the bonds on appeal, in favor of its agent and attorney in fact for Arizona, appearing upon page 310 and again upon page 316 of said transcript.

Dated at San Francisco, California, this 29th day of November, 1933.

BAKER & WHITNEY
JAMES E. LYONS
BURTON MASON
Attorneys for Defendants and Appellants.

[Endorsed]: Service of the within Statement by Appellants of Parts of Record Necessary to be

Printed is admitted this 4th day of Dec., 1933.

SAMUEL WHITE,
F. L. SNELL, JR.,
Attorneys for Plaintiffs and Appellees.

[Endorsed]: Filed Dec. 6, 1933. Paul P. O'Brien, Clerk.

[Endorsed]: No. 7343. United States Circuit Court of Appeals for the Ninth Circuit. Southern Pacific Company, a corporation, Appellant, vs. F. J. Baffert and A. S. Leon, copartners, trading under the firm name of Baffert & Leon, Appellees, and Southern Pacific Company, a corporation, and Santa Maria Valley Railroad Company, a corporation, Appellants, vs. Wheeler-Perry Company, a corporation, Appellee. Transcript of Record. Upon Appeals from the District Court of the United States for the District of Arizona.

Filed November 27, 1933.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7343

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY,
Defendant and Appellant,

vs.

F. J. BAFFERT and A. S. LEON, co-partners, trading under the firm name of Baffert & Leon,
Plaintiffs and Appellees.

SOUTHERN PACIFIC COMPANY, et al.,
Defendants and Appellants,

vs.

WHEELER-PERRY COMPANY,
Plaintiff and Appellee.

APPELLANTS' OPENING BRIEF.

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FILED
SEP 27 1934
PAUL P. O'BRIEN,

Subject Index

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No. 7343

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY,
Defendant and Appellant,

vs.

F. J. BAFFERT and A. S. LEON, co-partners, trading under the firm name of Baffert & Leon,
Plaintiffs and Appellees.

SOUTHERN PACIFIC COMPANY, et al.,
Defendants and Appellants,

vs.

WHEELER-PERRY COMPANY,
Plaintiff and Appellee.

APPELLANTS' OPENING BRIEF.

STATEMENT OF THE CASE.

These appeals are prosecuted to reverse judgments rendered by the United States District Court for Arizona, in two actions at law brought in that Court, in which appellants were defendants, and appellees were plaintiffs. The two cases presented identical questions of law and fact, and were consolidated in the trial

Court for purposes of trial and decision (R. 123). They are here presented upon a consolidated record, and in this brief they will be treated as one.

The instant cases resemble, in many respects, No. 7341, *El Paso & Southwestern R. Co. v. Phelps-Dodge Merc. Co.,* and No. 7342, *Santa Maria Valley R. Co. v. Solomon-Wickersham Co.,* now pending before this Court upon appeals from judgments of the same District Court.

During the period between March 5, 1923, and May 1, 1928, plaintiffs[1] received at Tucson, Arizona, 41 carload shipments of sugar, which had moved from various points (Crockett, San Francisco, Oxnard and Betteravia) in California, upon which freight charges were assessed at the contemporaneous commodity rates. All but three of the shipments were delivered on or prior to September 15, 1925. Those three shipments were delivered during March, April, and May, 1928 (R. 37, 49-50).

On March 6, 1925, and February 6, 1926, plaintiffs, as complainants, filed complaints with the Interstate Commerce Commission in which they alleged that defendants' rates on sugar, in carloads, from various points in California, including those above-named, to Tucson, had been, and in future would be, unreasonable, in violation of Section 1 of the Interstate Commerce Act. The Commission was asked to determine what would have been or would be reasonable rates in lieu of those attacked, and to award reparation, both upon past shipments, and those moving *pendente*

1. Throughout this brief the parties are designated in the same manner as in the trial Court.

lite. On March 12, 1928, the Commission rendered its decision, covering those complaints as well as a number of others consolidated therewith, in which it declared, among other things, that the rates attacked had been unreasonable, and that reparation was due:

Traffic Bureau, Phoenix Chamber of Commerce, et al. v. A. T. & S. F. Ry. Co., et al. (1928), 140 I. C. C. 171.

For convenience, this decision will be referred to herein as the *"Third Phoenix Case"*, adopting the designation used in prior cases before this Court, which arose out of the same decision, particularly:

A. T. & S. F. Ry. Co. v. Arizona Grocery Company (1931),[2] 49 F. (2d) 563, (*affirmed,* 1932) 284 U. S. 370;

Arizona Wholesale Grocery Co. v. S. P. Co. (Jan. 24, 1934),[3] 68 F. (2d) 601.

A copy of the opinion, and the orders for the future, entered in the *Third Phoenix Case* is annexed as Exhibit A to the complaint in No. L-738-Phoenix (R. 8-36). A copy was also received in evidence at the trial, as Plaintiffs' Exhibit 1 (R. 123-124).

Following the decision in the *Third Phoenix Case,* and as directed therein, plaintiffs compiled and submitted to the Commission tabular statements (called "Rule V Statements") setting forth essential information as to the shipments upon which reparation was claimed. In due course, the Commission entered supplementary orders (Sept. 7, 1929, and April 13,

2. For convenience, this case is referred to hereinafter as the *"Arizona Case"*.

3. For convenience, this case is referred to hereinafter as the *"Wholesale Grocery Case"*.

1931), in evidence as Plaintiffs' Exhibits 2 and 3 (R. 124) authorizing and directing the payment of reparation, in specified amounts, to plaintiffs and various other shippers (R. 40-41, 52-53). A copy of the Rule V statement covering the Baffert & Leon shipments appears as Exhibit B to the complaint in No. L-738-Phoenix (R. 37), and was by stipulation considered in evidence (R. 125). A copy of the Rule V statement covering the Wheeler-Perry shipments is attached as Exhibit A to the complaint in No. L-844-Phoenix, and was introduced as Plaintiffs' Exhibit 4 at the trial (R. 125). Defendants declined to comply with the reparation orders (R. 92); and thereupon the instant suits were commenced, pursuant to Section 16(2) of the Interstate Commerce Act (49 U. S. C. 16-2).

The primary (but not the only) defense urged in these causes was and is the same as that successfully maintained in the *Arizona* and *Wholesale Grocery Cases,* supra: namely, that the rates and charges under attack conformed to a prior formal declaration by the Commission dealing with the same transportation services, and the attempted awards were therefore beyond the Commission's power. In order that the defendants' contention may be more readily understood, it is desirable at this point to review briefly the evolution of the rates which, as applied upon plaintiffs' shipments, were afterwards found unreasonable in the *Third Phoenix Case,* and made the subject of the awards here in suit.

On April 15, 1914, the Arizona Corporation Commission filed a complaint with the Interstate Com-

merce Commission, attacking as unreasonable the rates on sugar and syrup in straight and/or mixed carloads, from all producing points in California to all destinations in Arizona. The proceeding is reported as Docket 6806, *Arizona Corporation Commission v. A. T. & S. F. Ry. Co., et al.* (1915), 34 I. C. C. 158. A copy of the opinion and order was received in evidence at the trial, as Defendants' Exhibit A (R. 128-137). While Docket 6806 was pending, but before its final submission, the carriers defendant therein *voluntarily* reduced their rates from substantially all California producing points to all important destinations in Arizona, including Tucson. These reductions included the publication of lower rates than previously in effect, and the initiation of rates upon still lower levels, subject to an increased minimum carload weight of 60,000 pounds. (The minimum under the previous rates had been 36,000 pounds.) As thus established, the reduced rate to Tucson, subject to the 60,000-pound minimum, became 55 cents[4] (R. 132; Defendants' Exhibit E: R. 200-201). The Commission, in deciding Docket 6806, took notice of these reductions, and concluded (R. 135) that the rates attacked had not been shown unreasonable to any greater extent than the amounts of such reductions: i. e., that the rates as thus reduced were reasonable for the future. In conformity with that finding, the 55-cent rate to Tucson, as made effective during the pendency of Docket 6806, was continued in effect without any change until June 25, 1918.

4. Unless otherwise specified, all rates herein are stated in amounts per hundred pounds.

In the meantime, on December 29, 1917, possession, control, and operation of the railroad properties of the defendant carriers was assumed by the President, acting through the Director-General of Railroads as head of the United States Railroad Administration, all as provided by the Federal Control Act, 40 Stat. L. 451 (R. 205). On June 25, 1918, pursuant to General Order No. 28 of the Director-General, the 55-cent rate, together with all other rates generally throughout the United States, was advanced 25 per cent. On November 25, 1919, that 25 per cent advance was superseded by a flat advance of 22 cents (Defendants' Exhibits E, F, and G: R. 200-201, 205-213). This change was likewise pursuant to order of the Director-General.

On March 1, 1920, defendants resumed possession, control and operation of their properties, upon the termination of Federal Control. The rate then in effect (77 cents), which was the rate in effect on May 25, 1915, subject only to the changes made by the Director-General during Federal Control, was continued in effect without any change until August 26, 1920.

On that date, the rate was advanced 25 per cent (to 96½ cents), in conformity with the Commission's decision in:

> *Ex Parte 74, Increased Rates 1920,* 58 I. C. C. 220.

The changes then made applied to all rates throughout the country, both on sugar and other commodities generally, although the percentages of advance were not uniform.

On August 22, 1921, the rate was *voluntarily* reduced from 96½ to 96 cents. On July 1, 1922, it was further reduced 10 per cent (to 86½ cents), in accordance with the recommendations made by the Commission in:

Reduced Rates 1922, 68 I. C. C. 676.

This change was similar to the advances of 1918 and 1920, in that it was general in character, practically all rates throughout the country having been affected thereby.

On January 11, 1924, a further voluntary reduction was made, to 84 cents. On October 27, 1925, the rate was further reduced to 75 cents: the Commission having, in Docket 14,140, *Solomon Wickersham Co. v. S. M. V. R. Co., et al.,* 101 I. C. C. 667, prescribed that rate to Bowie, a more distant point on the same line. Docket 14,140 was subsequently reopened (in January, 1926), and re-decided in conjunction with the *Third Phoenix Case;* but the order therein was not suspended pending such reconsideration. The 75-cent rate therefore continued in effect without further change until June 11, 1928, the effective date of the rates prescribed for the future in the *Third Phoenix Case.* All of the aforementioned changes are shown in detail in the defendants' exhibit reciting the history of the rates (Exhibit E: R. 200-201).

As shown by the Rule V statements, the rates of 86½ cents, 84 cents, and 75 cents, which were successively in effect during the period between July 1, 1922, and June 11, 1928, were the rates charged

on the shipments upon which plaintiffs seek reparation. The rates found reasonable for reparation purposes, in lieu of those charged, are 77 cents from northern California points (San Francisco and Crockett), and 73 cents from southern California points (Betteravia and Oxnard) (R. 26). It may be noted that the 77-cent rate thus prescribed *exceeds,* by two cents, the rate actually in effect from Northern California points following October 27, 1925, under the order in Docket 14,140. The Commission did not, however, attempt to make the 77-cent rate retroactive, so as to increase charges collected under the 75-cent rate. In awarding reparation, it allowed no off-setting credit in defendants' favor, on account of this difference between the rate charged and that afterwards found reasonable.

The changes in the rate to Tucson, during the period from June 27, 1921, to February 24, 1925, were precisely the same as those made in the rate from the same origins to Phoenix during the same period, as recited in the opinions of the Supreme Court (284 U. S., at pp. 381, 382) and this Court (49 F. (2d), at p. 565), in the *Arizona Case.*

The instant suits were consolidated for trial, and were tried by the Court sitting without a jury, trial by jury having been duly waived in writing (R. 68-69). At the trial defendants advanced the following contentions:

1. The rates on sugar from the points of origin of the plaintiffs' shipments to Tucson were approved

and declared to be reasonable by the Commission, by the decision in Docket 6806.

2. The rates approved as reasonable in Docket 6806 were continued in effect thereafter, throughout the period of movement of the shipments upon which reparation is sought, subject (1) to certain general changes, including two or more advances and one reduction, authorized and/or required by the United States, acting through the Director-General and the Commission, and (2) to certain incidental reductions by defendants.

3. The rates assessed upon the shipments upon which reparation is sought were, in all instances, equal to or less than the rates approved as reasonable by the Commission in Docket 6806, as modified by the above-mentioned orders or recommendations of the Director-General and the Commission.

4. The Commission was without jurisdiction to make any valid order awarding reparation upon plaintiffs' shipments moving under rates equal to or less than those approved in Docket 6806, as subsequently modified.

5. Apart from the question of the Commission's jurisdiction, the finding in the *Third Phoenix Case,* upon which the reparation orders in suit are founded, is legally inadequate to sustain those orders, and affords no satisfactory evidence that the rates and charges against which reparation is sought were unreasonable. The balance of plaintiffs' evidentiary showing is either incompetent, or otherwise inadequate to support the complaints.

6. The defendants' affirmative showing demonstrates that the rates charged were not unreasonable. This showing is ample to overcome whatever *prima facie* evidentiary value may reside in plaintiffs' evidence.

On the other hand, plaintiffs contended that, even if the Commission had, in Docket 6806, approved as reasonable the rates then before it, the subsequent changes so modified the rates as to destroy the effect of the Commission's prior approval, and thus rendered the rates as charged subject to the Commission's reparation jurisdiction; that the Commission's finding with respect to reparation, in the *Third Phoenix Case,* was jurisdictionally made and therefore valid, and that the reparation orders in suit, which are founded thereon, are likewise valid; that the finding and orders constitute *prima facie* evidence of the unreasonableness of the rates charged, and of the fact and amount of the damage alleged to have been incurred by plaintiffs; that this *prima facie* showing was further supported by supplementary testimony offered by plaintiffs; and that defendants' showing failed entirely to overcome plaintiffs' *prima facie* case.

Although the trial Court rendered no formal opinion, it apparently adopted the views advanced by plaintiffs. After making special findings of fact and conclusions of law, largely as proposed by plaintiffs, and rejecting those requested by defendants, it rendered judgments as demanded in the complaints, including interest, and an allowance of 20 per cent of the principal plus interest in each case, on account of

attorneys' fees. The cases now come to this Court upon appeals from those judgments.

ASSIGNMENTS OF ERROR.

The errors asserted and relied upon by defendants and appellants are as follows (R. 276-315):

1. The Court erred in overruling defendants' objection to the admission in evidence of Plaintiffs' Exhibit 5, and in receiving said Exhibit 5 in evidence, and erred further in overruling defendants' motion to strike said Exhibit 5 from the record (Assignments of Error Nos. 3, 4).

2. The Court erred in failing to find and conclude that the rates on sugar, in carloads, from the California points of origin of the plaintiffs' shipments to Tucson were approved as just and reasonable by the Commission in its decision in Docket 6806; that the rates so approved were continued in effect, subject only to intervening modifications authorized and/or required by the United States, acting through the Director-General of Railroads, as the agent of the President, and through said Commission, and to certain voluntary reductions made by the defendants, following their approval by the Commission, and throughout the period of movement of plaintiffs' shipments upon which reparation is sought; and that the rates charged and applied upon plaintiffs' shipments were in all instances equal to, or less than, those approved and declared to be reasonable by the Commission in said Docket 6806, as modified only by the

intervening authorized general modifications just referred to (Assignments of Error Nos. 10, 11, 12, 13, and 28).

3. The Court erred in failing to find and conclude that the purported finding, and the orders awarding reparation to plaintiffs made and issued by the Commission on September 7, 1929, and April 13, 1931, upon which the plaintiffs' suits are founded, were and are void and of no effect, for the reason that said Commission was and is without jurisdiction, under the law, to make said orders, or any orders, purporting to award reparation for the collection of charges based upon rates duly published and maintained by defendants pursuant to and in conformity with previous lawful, valid, formal findings; and in finding and concluding that said purported finding and orders for the payment of reparation were and are legal, valid and binding, and within the jurisdiction conferred by law upon said Commission (Assignments of Error Nos. 18, 22, 25, 29, and 33).

4. The Court erred in finding and concluding that the rates and charges assessed upon plaintiffs' said shipments were unreasonable, and in violation of the Interstate Commerce Act; and in failing to find that, as measured by rates approved or prescribed by the Commission itself, and thus conclusively established as reasonable, from and to the same and closely related points of origin and destination, said rates as charged were in all respects just and reasonable, and in full conformity with all requirements of said Act (Assignments of Error Nos. 14, 15, 16, 17, 19, 20, 26, and 30).

5. The Court erred in failing to find and conclude that plaintiffs have failed entirely to establish the causes of action alleged in their complaints, or either of them, or any cause of action whatever against the defendants, or either of them; and in failing to grant defendants' motion for a nonsuit against plaintiffs in each cause, and for the entry of judgments in favor of defendants, duly made at the conclusion of plaintiffs' testimony in chief; and in failing to grant defendants' further motion for judgments in favor of defendants and against plaintiffs, upon the pleadings and the evidence, duly made at the conclusion of the taking of the testimony at the trial (Assignments of Error Nos. 1, 5, and 30).

6. The Court erred in finding that plaintiffs have been damaged, by reason of the assessment of the rates and charges applied and collected upon plaintiffs' said shipments, and the refusal of defendants to pay reparation to plaintiffs as awarded by the Commission, and in concluding that plaintiffs are entitled to judgments against defendants, and that defendants are indebted to plaintiffs as follows: the defendant, Southern Pacific Company to plaintiffs F. J. Baffert and A. S. Leon, in the sum of $726.28, together with interest amounting to the sum of $191.95, together with attorney's fees amounting to the sum of $222.82; and the defendant, Southern Pacific Company, to plaintiff Wheeler-Perry Company in the amount of $1090.09, together with interest amounting to the sum of $581.48, together with attorney's fees amounting to the sum of $359.98; and defendant Santa

Maria Valley Railroad Company, to plaintiff Wheeler-Perry Company, in the amount of $81.60, together with interest in the sum of $46.74, together with attorney's fees in the sum of $25.68; together with other lawful costs; and in refusing to find and conclude that defendants are entitled to judgments in said causes, and that plaintiffs take nothing by their actions herein (Assignments of Error Nos. 23, 27, and 31).

7. The Court erred in finding that plaintiffs were compelled to employ attorneys to prosecute and maintain said actions, and that 20 per cent of the total amount due, including principal and interest, is reasonable to be allowed plaintiffs as attorney's fees; and in refusing to find and conclude that plaintiffs are not entitled to recover any amount whatsoever, as and for fees of their attorneys in these causes (Assignments of Error Nos. 6, 24, and 31).

8. The Court erred in rendering and entering judgments, upon the facts as found by the Court, in favor of plaintiffs and against defendants, and in refusing to render and enter judgments upon the facts found, in favor of defendants; and erred further in failing to render and enter judgments in favor of defendants and against plaintiffs, predicated upon the findings of fact and conclusions of law proposed and requested by defendants, and upon the undisputed facts appearing in the evidence, upon which the said proposed findings and conclusions of defendants were and are predicated (Assignments of Error Nos. 32 and 33).

BRIEF OF ARGUMENT.

I. The Commission was without jurisdiction to make the finding and orders upon which the instant suits are based.

These suits cannot be maintained, except upon the basis of a valid reparation finding, and valid orders by the Commission.

Texas and Pacific Ry. Co. v. Abilene Cotton Oil Co. (1907), 204 U. S. 426;

Meeker v. Lehigh Valley R. Co. (1915), 236 U. S. 412;

Lewis-Simas-Jones v. S. P. Co. (1931), 283 U. S. 654.

1. *The Commission, by its decision in Docket 6806, approved as reasonable the rates on sugar in carloads from and to the points involved.*

The finding in Docket 6806 has already been referred to, and in effect construed, by this Court.

Arizona Wholesale Grocery Co. v. S. P. Co. (1934), 68 F. (2d) 601.

Findings made by the Commission in other cases, similar in language and import to that made in Docket 6806, have been construed both as approvals of the rates charged, and as findings of reasonableness.

Arizona Wholesale Grocery Co. v. S. P. Co., supra;

U. S. v. New River Co. (1924), 265 U. S. 533 (537, 541);

U. S. v. Illinois Central R. Co. (1924), 263 U. S. 515 (519, 520, 524);

Edward Hines Trustees v. U. S. (1923), 263 U. S. 143 (146);

Turner Lumber Co. v. C. M. & St. P. Ry. Co. (1926), 271 U. S. 259 (261, 263);

Alton R. Co. v. U. S. (1932), 287 U. S. 229 (231, 237);

Hohenberg v. L. & N. R. Co. (C. C. A. 5th, 1931), 46 F. (2d) 952 (954).

The essential issue presented in Docket 6806, and therefore necessarily decided therein, was whether the rates on sugar from California points to Arizona destinations, particularly Tucson, were and in future would be reasonable.

Interstate Commerce Commission v. Stickney (1909), 215 U. S. 98 (105);

A. T. & S. F. Ry. Co. v. U. S. (1914), 232 U. S. 199 (221);

Defendants' Exhibit A (R. 128, 129, 132, 133).

2. *The rates charged on the shipments here involved were in all instances equal to or less than the rate to Tucson approved in Docket 6806, as thereafter modified by the authorized general changes.*

Plaintiffs' Exhibit 1 (R. 13-16);

Defendants' Exhibit E (R. 200-201, 212-214).

The changes made during the period of Federal Control were accomplished in response to orders of the Director-General, then exercising powers conferred by the Federal Control Act, and acting as the authorized agent of the President.

Northern Pacific Ry. Co. v. North Dakota (1919), 250 U. S. 135 (148);

Mo. Pac. R. Co. v. Ault (1921), 256 U. S. 554 (557);

Dupont Co. v. Davis (1924), 264 U. S. 456 (462).

The general changes of 1920 and 1922 were in response to decisions of the Commission itself.

Increased Rates 1920, 58 I. C. C. 220;

Reduced Rates 1922, 68 I. C. C. 676.

3. *Under the rule of the controlling decisions, the reparation order in suit is void and unenforceable.*

Arizona Grocery Co. v. A. T. & S. F. Ry. Co. (1932), 284 U. S. 370;

Arizona Wholesale Grocery Co. v. S. P. Co., supra.

4. *The decision of the Circuit Court of Appeals for the Fifth Circuit, in the Eagle Case, is of no value as an authority to support the trial Court's decision.*

(a) *The intervening general changes did not operate to deprive the rates charged of their status as Commission-approved rates.*

The general changes of 1918, 1920, and 1922, were of precisely the same character.

Brimstone R. & C. Co. v. U. S. (1924), 276 U. S. 104.

In the *Arizona Case* the Supreme Court, and this Court, in effect held that the intervening change of 1922 did not operate to deprive the rate there under

consideration of its Commission-made status, although that rate had been prescribed prior to 1922, and had been modified by that general change. The decision in the *Eagle Case:*

Eagle Cotton Oil Co. v. A. G. S. R. Co. (C. C. A. 5th, 1931), 51 F. (2d) 443,

to the extent that it relies upon a contrary theory, is in conflict with the *Arizona Case,* and therefore not a controlling precedent. It is also in conflict with this Court's decision in the *Wholesale Grocery Case,* and the decision of the United States District Court for Arizona, in:

E. P. & S. W. R. Co. v. Arizona Corporation Commission (1931), 51 F. (2d) 573.

(b) *The effectiveness of the finding in Docket 6806, approving the rates, was not destroyed by the lapse of the time intervening prior to the charging of the assailed rates.*

The decision in the *Eagle Case* proceeds upon the theory that an *order* of the Commission, made in 1915, expired in two years. Defendants here rely upon a *finding* made by the Commission in 1915, in connection with which no order for the future was entered. The findings of the Commission are distinct from its orders.

Interstate Commerce Act, Sections 14, 15, 16 (1);

U. S. v. A. B. & C. R. Co. (1931), 282 U. S. 522 (527);

Brady v. Interstate Commerce Commission (1930), 43 F. (2d) 847 (850) (affirmed: 283 U. S. 804);

American Sugar Refining Co. v. D. L. & W. R. Co. (C. C. A. 3rd, 1913); 207 Fed. 733 (740-741);

C. B. & Q. R. Co. v. Merriam (C. C. A. 8th, 1922), 297 Fed. 1 (3-5).

The two-year limitation did not affect the Commission's *findings,* made prior to 1920.

Southern Pacific Co. v. Interstate Commerce Commission (1911), 219 U. S. 433 (452);

Southern Pacific Terminal Co. v. Interstate Commerce Commission (1911), 219 U. S. 498 (515).

Findings of the Commission, considered apart from its orders, themselves possess sufficient force to constitute a determination of the matters with which they deal.

Western Paper Makers' Chemical Co. v. U. S. (1926), 271 U. S. 268 (270);

Virginian R. Co. v. U. S. (1926), 272 U. S. 658 (665);

Owensboro Wheel Co. v. Director General (1922), 69 I. C. C. 503 (506);

Fels & Co. v. Penn. R. Co. (1912), 23 I. C. C. 483 (486-487).

A finding which determines the reasonableness of a rate *for the future* is conclusive until thereafter changed.

Interstate Commerce Commission v. Union Pacific R. Co. (1912), 222 U. S. 541 (547, 548);

Western Paper Makers' Chemical Co. v. U. S., supra;

A. T. & S. F. Ry. Co. v. U. S. (1914), 234 U. S. 294 (311);

Virginian R. Co. v. U. S., supra.

The decision in the *Arizona Case* follows and affirms that principle; but it appears to have been overlooked, if not entirely disregarded, in the *Eagle Case.*

The denial of certiorari in the *Eagle Case* imports no expression of opinion by the Supreme Court on the merits, and does not operate at all as an affirmance.

U. S. v. Carver (1921), 260 U. S. 482 (490);

Hamilton Shoe Co. v. Wolf Bros. (1916), 240 U. S. 251 (258).

II. The rates and charges assessed upon the shipments upon which reparation is claimed were not unreasonable.

1. *The substantive issue of the reasonableness of the rates as charged was properly presented for determination by the trial Court. That determination may be reviewed by this Court upon this appeal.*

The issue of the reasonableness of the rates is duly presented by the pleadings.

Complaint in No. L-738: Paragraphs III, VIII (R. 3-4, 6-7);

Complaint in No. L-844: Paragraphs IV, IX (R. 44, 47);

Amended Answer in No. L-738: Paragraphs II, VII (R. 58-59, 61-62);

Answer in No. L-844: Paragraphs II, VII (R. 64, 66-67).

In this suit the finding and order of the Commission are merely *prima facie* evidence, and are not conclusive upon the Court or the defendants.

Interstate Commerce Act, Section 16(2);

Meeker v. Lehigh Valley R. Co., supra;

Spiller v. A. T. & S. F. Ry. Co. (1920), 253 U. S. 117 (131-132);

Lewis-Simas-Jones v. S. P. Co., supra;

B. & O. R. Co. v. Brady (1933), 288 U. S. 448 (457, 458);

C. N. O. & T. P. Ry. Co. v. I. C. C. (1896), 162 U. S. 184 (196);

Pittsburgh & W. Va. Ry. Co. v. U. S. (1924), 6 F. (2d) 646 (648);

Brady v. I. C. C., supra;

Blair v. Cleveland, C. C. & St. L. Ry. Co. (1931), 45 F. (2d) 792;

Atlantic Coast Line R. Co. v. Smith Bros. (C. C. A. 5th, 1933), 63 F. (2d) 747 (748) (certiorari denied: 289 U. S. 761);

Southern Ry. Co. v. Eichler (C. C. A. 8th, 1932), 56 F. (2d) 1010 (1018).

The question was properly saved for review upon this appeal by exceptions to the rulings of the trial Court, which rejected defendants' proposed findings

and adopted those proposed by plaintiff, and denied defendants' motions for a nonsuit and for judgment on the evidence (R. 126-127, 224, 247, 249).

Maryland Casualty Co. v. Jones (1929), 279 U. S. 792;

Fleischmann Co. v. U. S. (1926), 270 U. S. 349 (356);

Southern Ry. Co. v. Eichler, supra.

2. *Plaintiffs' evidence is wholly inadequate, as a matter of law, to support the trial Court's finding and conclusion that the rates and charges in issue were unreasonable.*

(a) *The Commission's finding in the Third Phoenix Case is partially invalid, under various Court decisions, and therefore incompetent and inconsistent in its entirety.*

(1) *The reparation finding is invalid and incompetent because based upon a demonstrated misconception of law.*

Arizona Grocery Co. v. A. T. & S. F. Ry. Co., supra;

Arizona Wholesale Grocery Co. v. S. P. Co., supra;

T. F. Miller Co. v. A. T. & S. F. Ry. Co. (U. S. D. C. Arizona, April 15, 1933).

(2) *The enforcement of the reparation finding and orders would create unlawful discriminations. The finding and orders are therefore invalid, and of no force as evidence to support plaintiffs' contentions.*

Discriminations may be accomplished just as effectively by the compulsory refund of a portion of the charges collected for one of two equivalent or similar services, but not the other, as by the initial charging of different amounts.

Wight v. U. S. (1897), 167 U. S. 512;
Penn. R. Co. v. International Coal Co. (1913), 230 U. S. 184;
Mitchell Coal Co. v. Penn. R. Co. (1913), 230 U. S. 247;
Texas and Pacific Ry. Co. v. Abilene Cotton Oil Co., supra;
Phillips v. Grand Trunk Ry. Co. (1915), 236 U. S. 662;
Union Pac. Ry. Co. v. Goodridge (1893), 149 U. S. 680.

The enforcement of the reparation finding and orders here in suit would create again discriminations exactly similar to those previously condemned by the Commission itself, and would thus defeat the Act's basic purpose: namely, to do away with discriminations and inequalities.

First Phoenix Case (1921), 62 I. C. C. 412 (Defendants' Exhibit B: R. 138-149);
New York, N. H. & H. R. Co. v. I. C. C. (1906), 200 U. S. 361 (369);
United States v. Union Stock Yard (1912), 226 U. S. 286 (307, 309).

Discriminations thus declared to be unlawful would not become clothed with legality simply because due to the enforcement of orders of the Commission rather

than the carriers' voluntary acts. "What the carrier may not lawfully do, the Commission may not compel."

Texas and Pacific Ry. Co. v. U. S. (1933), 289 U. S. 627 (637);

S. P. Co. v. Interstate Commerce Commission, supra;

Interstate Commerce Commission v. Diffenbaugh (1911), 222 U. S. 42 (46);

Ellis v. Interstate Commerce Commission (1916), 237 U. S. 434 (445);

U. S. v. Illinois Central R. Co., supra;

Anchor Coal Co. v. U. S. (1927), 25 F. (2d) 462 (471-472).

(3) *The acceptance of the reparation finding as valid prima facie evidence fails to give any proper effect to the controlling decisions in the Arizona and Wholesale Grocery Cases.*

The decision in the *Arizona Case* determined that the 96½-cent rate to Phoenix prescribed in the *First Phoenix Case* in 1921 was the conclusive measure of a reasonable rate to Phoenix as long as the Commission's order continued in effect.

Arizona Grocery Co. v. A. T. & S. F. Ry. Co., supra (284 U. S., p. 383).

The decision in the *Wholesale Grocery Case* applied the same principle to the rates to Globe and Safford approved by the Commission in the *Graham Case.* The same principle applies in the case of the rates to Clarkdale and Douglas, which were also approved by

the Commission. The rates thus prescribed or approved constituted conclusive measures of reasonable rates for the transportation services to Tucson, which should have been followed by the trial Court.

(b) *The showing attempted by plaintiffs, apart from the reparation finding and orders in the Third Phoenix Case, was largely incompetent and in any event wholly inadequate to support the trial Court's findings and judgments.*

Plaintiffs' Exhibit 5 was incompetent because not prepared by the witness through whom it was introduced (R. 223). In any event, it was nothing but a reproduction of a part of the opinion in the *Third Phoenix Case* (R. 25, 26), in evidence as Plaintiffs' Exhibit 1. It was therefore improperly admitted as rebuttal testimony.

Wigmore on Evidence, 4th ed., Vol. III, Sect. 1873;

Revised Code of Arizona, 1928, Sect. 3807;

24 *Cal. Juris.* 764-765.

The exhibit is based upon a completely erroneous assumption (R. 21, 216, 223).

3. *Defendants' evidence demonstrates conclusively that the rates as charged were not unreasonable.*

Defendants' showing compares the rates charged with the prescribed or approved rates to Phoenix, Globe, Safford and Douglas.

Defendants' Exhibits B, C and D (R. 138-197);
Defendants' Exhibit F (R. 202-203; 212-217).

These comparisons with Commission-made or approved rates constitute the best possible tests of the reasonableness of the rates charged.

Blackman, et al. v. A. C. & Y. R. Co., et al. (1918), 49 I. C. C. 649 (654);

Montgomery v. A. & S. Ry. Co., et al. (1928), 147 I. C. C. 415 (418);

Federated Metals Corp. v. Central R. R. Co. (1927), 126 I. C. C. 703 (709);

Illinois Electric Co. v. C. B. & Q. R. Co. (1928), 140 I. C. C. 63 (65);

Western Paper Makers' Chemical Co. v. U. S., supra;

Montrose Oil Refining Co. v. St. L. & S. F. Ry. Co. (1927), 25 F. (2d) 750 (752, 753).

These comparisons, being with rates conclusively established as just and reasonable, afford evidence ample to overcome any *prima facie* case made out in plaintiffs' favor by the reparation finding and orders.

Atlantic Coast Line R. Co. v. Smith Bros., supra;

Southern Ry. Co. v. Eichler, supra.

ARGUMENT.

FOREWORD.

Two major questions are presented by this appeal.

First, there is the primary question of law, whether the trial Court erred: (1) in failing to make findings, based upon defendants' undisputed showing, setting forth (a) the Commission's prior approval of the rate

on sugar from the California points of origin involved in the case to Tucson, (b) the subsequent maintenance of rates equal to or less than the rate so approved, subject only to general modifications initiated, required or recommended by the Director-General of Railroads and the Commission, and (c) the application and assessment of such rates upon plaintiffs' shipments; and (2) in failing to conclude that the reparation finding and orders in suit are in excess of the Commission's powers, and therefore void.

Second, there is the question, also one of law, whether, even if it be held that the Commission possessed *abstract* jurisdiction to award reparation upon the shipments in question, the trial Court erred: (1) in failing to find and conclude that the Commission's finding relied upon by plaintiffs has been deprived of any value as *prima facie* evidence, by reason of controlling decisions of the Supreme Court, and of this Court, involving the same finding; and (2) in finding and concluding that said finding, as supplemented by plaintiffs' other testimony, is sufficient to overcome the evidentiary showing of the reasonableness of the rates charged, adduced by defendants.

I.

THE COMMISSION WAS WITHOUT JURISDICTION TO MAKE THE AWARDS UPON WHICH THE INSTANT SUITS ARE BASED.

In this argument we shall first discuss the primary question, whether the finding and reparation orders

in suit are void, because in excess of the jurisdiction conferred upon the Commission. It is clear that if they are void, the actions have no basis at all, and it becomes unnecessary to review the secondary issue outlined in the preceding statement. Controlling decisions of the Supreme Court have definitely established that a suit at law for the recovery of reparation (damages) for the charging of alleged unreasonable interstate rates cannot be maintained in any Court, unless the plaintiff has first made complaint before the Commission, and secured a definite finding and a formal order declaring the fact and amount of the reparation due and authorizing its payment.

Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co. (1907), 204 U. S. 426;

Meeker v. Lehigh Valley R. Co. (1915), 236 U. S. 412;

Lewis-Simas-Jones Co. v. S. P. Co. (1931), 283 U. S. 654.

Defendants' contention, upon the primary issue, is simply that, under the principles laid down in the *Arizona Case* and the *Wholesale Grocery Case,* as applied to the undisputed facts of the instant case, the awards are in excess of the Commission's jurisdiction, and therefore void. In the *Arizona Case,* this Court and the Supreme Court declared in substance that when the Commission, after hearing, has declared what is the maximum reasonable rate thereafter to be charged by a carrier, it may not subsequently subject a carrier which conformed to that declaration to the payment of reparation measured by the rate which the Commission later holds should have been estab-

lished: in other words, that carriers cannot be held in damages for having charged rates conforming to prior formal declarations of the Commission. In the *Wholesale Grocery Case,* this Court held that the principle of the *Arizona Case* applies to situations where the rates as charged are equal to, or less than, those previously *approved* by the Commission. In the following discussion, we shall show that the facts of the instant cases bring them within the rule of those decisions.

1. The Commission, by its decision in Docket 6806, approved as reasonable the rates on sugar, in carloads, from and to the points involved.

The finding made in Docket 6806 has been referred to in our statement of the case. So far as material here, it was as follows (R. 135):

> "Upon examination of all the evidence of record, we are of the opinion and find that the rates on sugar and syrup in straight carloads from points in California to points in Arizona in effect at the time of the hearing have not been shown to be unreasonable to a greater extent than the amounts of the reductions since made."

Under controlling decisions of this Court, and of the Supreme Court, this finding must be construed as an *approval* of the rates then in effect (i. e., the rates as reduced during the pendency of the proceeding), as reasonable for future application. Indeed, this very finding has already been so construed, at least inferentially, in this Court's recent decision in the *Wholesale Grocery Case.* In that opinion this Court,

after quoting a portion of the report in Docket 6806 including the above, cited a later decision of the Commission, in which it was declared that in Docket 6806, it had been held "that the sugar rates, in effect on and after November 15, 1914 (from California origins to Arizona destinations) were not shown to be unreasonable":

> *Graham, etc., Traffic Ass'n v. A. E. R. Co.* (1916), 40 I. C. C. 573 (576).

In the *Wholesale Grocery Case,* this Court also reviewed the finding of the Commission in the *Graham Case,* which was similar to that made in Docket 6806, and held it to be an approval of the rates under review. The *Graham Case* is reported as:

> *Graham & Gila Counties Traffic Ass'n v. A. E. R. Co.* (1923), 81 I. C. C. 134;

and is in evidence as Defendants' Exhibit D (R. 175-197). The finding reads as follows (R. 193):

> "As in *State of Idaho ex rel. v. Director General,* supra, the record in the instant case does not support a finding of unreasonableness."

In that case the Commission considered not only sugar rates, but also the class rates, and rates on various other commodities, from California origins to points on the Globe branch. This Court held that the quoted finding was, in effect, "a positive finding of a negative fact"; i. e., an approval of the reasonableness of the sugar rates and other rates then under review. The finding in Docket 6806 was fully as definite and positive as that made in the *Graham Case,* and should receive a similar construction.

In other cases, the Commission, in making findings with respect to the issues before it, has used language similar to, and in many instances less positive than that employed in Docket 6806; nevertheless the Supreme Court, and (in one case) the Circuit Court of Appeals for the Fifth Circuit, have construed such language as constituting definite findings that the challenged rates or practices were reasonable (or "not unreasonable"), and/or as positive approvals of the rates as reasonable.

In

U. S. v. New River Co. (1924), 265 U. S. 533,

the Supreme Court reviewed the Commission's decision in

Bell & Zoller Coal Co. v. B. & O. S. W. R. Co. (1922), 74 I. C. C. 433,

in which the Commission said:

> "The present facts considered, we do not conclude upon these records that the rule attacked ** * is in principle unreasonable or unduly prejudicial."

The Supreme Court said, of this finding (265 U. S., at p. 537):

> "December 11, 1922, it (the full Commission) reversed the findings of Division 5, and found that Rule 4 was not unreasonable or unduly prejudicial."

The Court said further (at p. 541) that the order was *"not merely negative"*, but *"clearly permitted and authorized"* the carriers to apply the challenged rule; and that it was plainly the intention and purpose of

the Commission that the challenged rule should be applied.

In

U. S. v. Illinois Central R. Co. (1924), 263 U. S. 515,

the Supreme Court reviewed the decision in

Swift Lumber Co. v. F. & G. R. Co. (1921), 61 I. C. C. 485,

in which the Commission had said:

> "We do not find that the rates on yellow pine * * * in effect subsequent to January 1, 1919, from Knoxo to the destinations in question were intrinsically unreasonable * * *."

The Supreme Court said (263 U. S., at p. 519):

> "The Commission found that the rates from Knoxo were not unreasonable."

Elsewhere in the opinion the Court further indicated the view that this statement should be considered equivalent to a finding that the attacked rates were reasonable. At page 520, the Court said that the rates from Knoxo "have been found to be inherently reasonable"; and at page 524, it said that "the Knoxo rate is inherently reasonable".

In

American Wholesale Lumber Co. v. Director General (1922), 66 I. C. C. 393,

the Commission said (407):

> "We find that conditions existing at the time warranted the establishment of the penalty charge, and that it was not unreasonable or otherwise unlawful."

The Supreme Court twice interpreted that finding as "a positive finding of a negative fact".

In

Edward Hines Trustees v. U. S. (1923), 263 U. S. 143,

the Supreme Court said (146):

> "After extensive hearings the Commission held that * * * the charge then imposed had not been shown to be unreasonable."

In

Turner Lumber Co. v. C. M. & St. P. Ry. Co. (1926), 271 U. S. 259,

the Court twice referred to the finding. At page 261 it said:

> "This penalty charge was attacked as unreasonable * * * in *American Wholesale Lumber Ass'n v. Director General,* 66 I. C. C. 393, and there held by the Interstate Commerce Commission to be neither unreasonable nor otherwise unlawful."

At page 263, the Court said:

> "The power to impose such charges, if reasonable, is clear. Those here in question have been found by the Commission to be reasonable."

In

Wheelock & Bierd v. A. C. & Y. Ry. Co. (1931), 179 I. C. C. 517,

the Commission said (523):

> "We find that the assailed divisions of the reshipping or proportional rates *have not been*

shown to be unjust, unreasonable, or otherwise unlawful as alleged" (emphasis ours).

In construing that finding the Supreme Court twice interpreted it as a positive finding, saying, in

Alton R. Co. v. U. S. (1932), 287 U. S. 229 (231, 237):

"It (the Commission) found that the divisions of the so-called reshipping rates *were not unjust, unreasonable* or otherwise unlawful.

"By their unauthorized action the connecting carriers forced the Alton to become the moving party before the Commission, with the result that *the Commission's approval* of the divisions effected by them was expressed in the form of a refusal to interfere" (emphasis ours).

In

Montgomery Cotton Exchange v. L. & N. R. Co. (1926), 112 I. C. C. 325,

the Commission made the following finding (333):

"Under the circumstances here presented we are of the opinion and find that the rates assailed were not unreasonable under Section 1."

On reconsideration of the same case the Commission said (118 I. C. C. 157, 158-159):

"With respect to the allegation of unreasonableness, we find upon reconsideration, no occasion for a modification of the conclusion in the former report that the evidence did not warrant a finding of unreasonableness. * * * We accordingly find that the applicable rates were not and are not unreasonable."

Substantially similar findings were again made upon a further hearing of the same case (153 I. C. C., at p. 402). Upon review of these expressions, the Circuit Court of Appeals for the Fifth Circuit said, in

Hohenberg v. L. & N. R. Co. (1931), 46 F. (2d) 952 (954) (certiorari denied, 284 U. S. 617):

> "The contention that the rate was unreasonable was dismissed by the Commission and the same was held to be fair and reasonable."

All of the foregoing authorities were referred to and relied upon by this Court, in the *Wholesale Grocery Case,* to support its interpretation of the Commission's finding in the *Graham Case.* They are equally pertinent to the instant case, and strongly support the interpretation for which defendants contend.

It is clear, from the text of the report in Docket 6806, that the sole essential issue there presented for the Commission's determination was the reasonableness of the rates under review. Both in the synopsis (R. 128), and the summary of the complaint, in the first paragraph of the opinion (R. 129), the Commission set forth that the complaint alleged that the rates on sugar and syrup, in straight and mixed carloads, from producing points in California to *all* destinations in Arizona (Tucson being specifically named: R. 132, 133) were unjust and unreasonable, and made it clear that no other issue was presented. Under controlling decisions, the Commission's conclusions were neces-

sarily addressed to and constituted a determination of that particular issue.

Interstate Commerce Commission v. Stickney (1909), 215 U. S. 98 (105);

A. T. & S. F. Ry. Co. v. U. S. (1914), 232 U. S. 199 (221).

We ask the Court to conclude, in conformity with its decision in the *Wholesale Grocery Case,* that the determination made in Docket 6806 is to be construed as an approval of the reasonableness of the rates then in effect, from California points of origin to Tucson, for the reasons: (a) the issue of the reasonableness of such rates from California points of origin to all points in Arizona, including particularly Tucson, was the essential issue presented and necessarily determined in Docket 6806; (b) the findings in Docket 6806 have previously been interpreted by this Court, in the manner for which we now contend; and (c) precisely or substantially similar findings, in other cases, have been construed by the Supreme Court, by this Court, and by the Circuit Court of Appeals for the Fifth Circuit, as findings of reasonableness, and as approvals of the rates or practices challenged.

Defendants duly submitted to the trial Court a proposed finding, setting forth the fact of the Commission's approval of the rate on sugar to Tucson in Docket 6806 (Defendants' Proposed Finding No. 9: R. 239). That finding was rejected in its entirety (R. 247). We ask this Court to conclude that the trial Court erred in that respect, and that such error requires reversal of the judgment.

2. The rates charged on the shipments here involved were in all instances equal to or less than the rate to Tucson approved in Docket 6806, as thereafter modified by the authorized general changes.

In our "Statement of the Case" we have set forth the various changes which affected the rates on sugar from California to Tucson, between May 25, 1915, the date of the decision in Docket 6806, and February 27, 1923, the date of movement of the first shipment upon which reparation is sought. Those changes are all shown of record, particularly in Defendants' Exhibit E (R. 200-201, 212-214). A summary history of the rates also appears in Plaintiffs' Exhibit 1 (R. 13-16). The complete history is recited in Defendants' Proposed Findings Nos. 9 to 12, inclusive (R. 238-242), which, although founded upon *undisputed* testimony, were rejected by the trial Court (R. 247).

The only changes (except certain *voluntary* reductions which occurred *after* 1920), which affected the rates to Tucson, were accomplished either by the Director-General of Railroads, as head of the United States Railroad Administration, or in response to findings and orders of the Commission. These modifications of 1918, 1920, and 1922 were all of the same character, in that all rates, throughout the country, were at those times subjected to general modifications, which changes affected the sugar rates in common with substantially all other commodity rates. None of these changes was accomplished by the independent act of any of the defendants. The changes made by the Director-General were in reality imposed by the Federal Government, for the Director-General was

simply the authorized agent of the President, exercising powers conferred by Congress.

Northern Pac. Ry. Co. v. North Dakota (1919), 250 U. S. 135 (148);

Mo. Pac. R. Co. v. Ault (1921), 256 U. S. 554 (557);

Dupont Co. v. Davis (1924), 264 U. S. 456 (462).

We ask this Court to conclude that the trial Court erred in rejecting Defendants' Proposed Findings Nos. 9 to 12, inclusive, which set forth the history of the rate to Tucson approved in Docket 6806, and Defendants' Proposed Conclusion No. 1 (R. 247-248), which sets forth, in summary form, the approval of the rate in that decision, and the subsequent charging upon plaintiffs' shipments of rates equal to, or less than, the rate so approved, as modified by the intervening general changes and incidental voluntary reductions.

3. Under the rule of the controlling decisions, the reparation order in suit is void and unenforceable.

It having been definitely established that the rates as charged upon plaintiffs' shipments were in all instances equal to or less than that approved in Docket 6806, as modified by the intervening authorized general changes, it follows that the awards of reparation to plaintiffs are void and unenforceable, because in excess of the Commission's jurisdiction under the Interstate Commerce Act. The controlling principle of law was announced by the Supreme Court in the *Arizona Case,* with which this Court is fully familiar.

In substance, the Supreme Court there announced that a carrier which conformed to a formal declaration by the Commission, respecting the reasonableness of the rates to be charged by it, could not thereafter be required to pay reparation, measured by rates which the Commission in a subsequent proceeding, upon the same or a different record, thought proper to have been established. That principle was applied by this Court, in the *Wholesale Grocery Case,* to a situation not differing in any essential respect from that presented here. It was there held that when the Commission has *approved,* although not directly *prescribed,* a basis of rates to which the carrier thereafter conforms, it cannot subsequently award reparation against rates even lower than those theretofore approved.

Defendants proposed to the trial Court an appropriate conclusion of law (Defendants' Proposed Conclusion No. 2: R. 248), setting forth the invalidity of the reparation orders in suit. That conclusion, in common with the others proposed by defendants, was refused (R. 248). We ask this Court to hold that the trial Court erred in that respect.

4. The decision of the Circuit Court of Appeals for the Fifth Circuit, in the Eagle Case, is of no value as an authority to support the trial Court's decision.

(a) The intervening general changes did not operate to deprive the rates charged of their status as Commission-approved rates.

In presenting the instant case to the trial Court, counsel for plaintiffs relied largely upon the decision of the Circuit Court of Appeals for the Fifth Circuit in:

Eagle Cotton Oil Company v. A. G. S. R. Co. (1931), 51 F. (2d) 443.

It was asserted that that decision sustains the asserted validity of the reparation awards. We have no doubt that the trial Court was influenced thereby, and we anticipate that it will be again cited by plaintiffs' counsel upon this appeal. For that reason, we shall discuss the case at some length.

We assert that the *Eagle Case,* if in point at all, conflicts with the decisions of the Supreme Court in the *Arizona Case* and other cases; that it has been overruled, in effect, by the decision in the *Arizona Case;* and that consequently it is of no value as an authority.

The decision in the *Eagle Case* was rendered July 21, 1931. The Court reversed the decision (46 F. (2d) 1006) theretofore rendered by the District Court for the Southern District of Mississippi, in the same proceeding. The statement of facts, set forth in the majority opinion, shows that in 1915 the Commission, in passing upon a proposed increase in rates on coal, authorized the carriers to maintain thereafter a rate of $1.20 per ton from and to the points involved.

Coal and Coke Rates (1915), 35 I. C. C. 187.

In 1917, a general advance of 10 cents per ton was made, pursuant to the decision in:

Fifteen Per Cent Case (1917), 45 I. C. C. 303.

On June 25, 1918, the rate was further advanced, under authority of General Order No. 28 of the Director-General. The rate was likewise advanced in 1920, and reduced in 1922, in conformity with the

general changes authorized and required by the Commission in those years. The result was that following 1922, the rate became $2.03 per ton, as the evolution of the $1.20-rate approved in 1915. In

Eagle Cotton Oil Co. v. Southern Ry. Co. (1928), 140 I. C. C. 131,

the Commission undertook to award reparation against the $2.03-rate, to the extent that it exceeded $1.85 from certain mines, and $1.95 from certain others. The award was resisted, and the suit in the District Court followed.

Upon these facts the Circuit Court of Appeals held that the rate of $2.03 could not be regarded as having been fixed or prescribed by the Commission, and that there was no jurisdictional barrier to an award of reparation. The Court took notice of this Court's then recent decision in the *Arizona Case* (49 F. (2d) 563, dated March 23, 1931), but refused to apply the principle there announced.

It may be noted that one member of the Circuit Court (Circuit Judge Hutcheson) concurred in the judgment of reversal, but disagreed with the majority as to the principles involved. He declared that, in his opinion, the rate made the subject of the reparation order, while not specifically *prescribed* by the Commission, had received, speaking generally, the Commission's *approval* and *sanction*. He then disapproved the principle set forth in this Court's decision in the *Arizona Case,* adhering to the view that the Commission might properly award reparation against rates which it had previously prescribed or approved.

At the time of the *Eagle* decision, a petition for certiorari to review this Court's decision in the *Arizona Case* was pending before the Supreme Court; and certiorari was later granted (Oct. 12, 1931; 284 U. S. 600).

The opinion in the *Eagle Case* indicates that the majority of the Court based its conclusion, that the rates as charged were not to be regarded as Commission-made, in large part upon the fact that the rates originally approved had been subjected to several intervening general changes, particularly the general changes of 1920 and 1922. The Court cited:

> *Brimstone R. & C. Co. v. U. S.* (1924), 276 U. S. 104,

and quoted a portion of that opinion, in which it was said (122):

> "The general findings and permission of *Ex Parte, 74* and *Matter of Reduced Rates* did not approve or fix any particular rate * * * In them the Commission was dealing with the whole body of rates throughout the country—was looking at the general level of all rates—and the propriety of the rates to which the Brimstone Company was party was not the subject of particular investigation or consideration."

The Circuit Court therefore concluded that the intervening changes had taken away from the original rates whatever Commission-made status they had possessed.

The rates which were the subject of the reparation award involved in the *Arizona Case* likewise passed through one of these same general changes, for the

rate prescribed in the *First Phoenix Case,* in 1921, was 96½ cents; whereas the 96-cent rate, established in conformity with the order, was reduced 10 per cent. in 1921, in response to the decision in *Reduced Rates 1922,* supra, and was further voluntarily reduced on January 11, 1924, in the same manner as the rate involved in the instant case. It was strongly urged, in the argument before the Supreme Court in the *Arizona Case* (Dec. 8, 1931), particularly by the Interstate Commerce Commission and certain others who appeared as *amici curiae* seeking to reverse this Court's decision, that this intervening general change had operated to deprive the rates, *as charged,* of any Commission-made status previously bestowed upon the original 96½-cent rate, by the decision in the *First Phoenix Case.* The decisions in the *Eagle Case* (in which certiorari had then but recently been denied: 284 U. S. 675; Nov. 30, 1931), and the *Brimstone Case* were particularly relied upon to support this contention. A summary of the argument thus made by the Commission, as *amicus curiae,* appears in the official report of the *Arizona Case* (284 U. S., at p. 380).

While the point is not separately discussed in the opinion, the Supreme Court in effect decided the contrary, for it concluded, apparently without difficulty, that the rates as actually charged retained the Commission-made status acquired, *prior* to the change, by the rate out of which they had evolved. The Court's failure to mention the issue specifically in its opinion did not render the decision any the less a complete determination and disposition thereof.

The question having been duly and fully presented, was necessarily resolved by the Court's judgment.

Grubb v. Public Utilities Commission (1931), 281 U. S. 470 (477, 478);

Fidelity etc. Co. v. U. S. (1902), 187 U. S. 315 (319);

Capuccio v. Caire (1932), 215 Cal. 518 (530).

This Court may recall that a somewhat similar argument was made by counsel appearing as *amici curiae* in the *Arizona Case.* A summary of this argument will be found in the concluding portion of this Court's opinion (49 F. (2d), at p. 571). Reference was made by counsel to the *Brimstone Case;* but this Court reached the conclusion, in which it was sustained (as noted above) by the result of the Supreme Court's decision, that the intervening general change of 1922 had not operated to deprive the rates of the Commission-made status conferred upon them in 1921.

It is not open to question that the general change of 1922 was precisely the same, in its essential character, as the general changes of 1918 and 1920. In fact, the changes of 1920 and 1922 are treated as having been the same, in legal effect, by both the Supreme Court, in the *Brimstone Case* (276 U. S., pp. 112-113, 122-123) and the Circuit Court of Appeals for the Fifth Circuit, in the *Eagle Case.*

Consideration of the facts involved in the *Wholesale Grocery Case* further supports our position. The rates actually reviewed by the Commission in the *Graham Case,* and there approved, were those in effect on January 18, 1922 (see 81 I. C. C., at p. 138;

Defendants' Exhibit D: R. 183). The shipments involved in that proceeding moved during 1923, 1924, and 1925; and since the general percentage change of 1922 became effective on July 1st of that year, obviously the rates *charged* were in all instances the rates considered and approved by the Commission, *as modified by that intervening change*. Nevertheless, this Court found no difficulty in reaching the conclusion that they had retained their Commission-approved status, and that reparation could not be awarded for their assessment. To that extent this Court's recent decision is thus in conflict with the conclusions of the Circuit Court for the Fifth Circuit in the *Eagle Case*.

The decision of the District Court for Arizona (three Judges sitting), in

E. P. & S. W. R. Co. v. Arizona Corporation Commission (1931), 51 F. (2d) 573,

is likewise inconsistent with the views announced in the *Eagle Case,* but wholly consistent with the position taken by the Supreme Court and by this Court in the *Arizona Case* and the *Wholesale Grocery Case*. In that case the plaintiff sought to have the Arizona Commission permanently enjoined from awarding reparation against certain intrastate rates which, prior to 1921, that Commission had approved. Subsequently to that approval, the Interstate Commission authorized the general increase of 1920, which the Arizona Commission refused to permit to become effective upon Arizona intrastate traffic. The Interstate Commission thereupon exercised its paramount jurisdiction, and required the state rates to be advanced in the same manner as the interstate rates.

Later, the Arizona Commission assented to the increase. The Arizona rates were also subjected to the general reduction of July 1st, 1922. The Court held that, despite the general advance and reduction since the rates were first approved, those rates, as charged *subsequent* to 1922, were not subject to reparation, and granted a permanent injunction, from which no appeal was taken. The Court cited (51 F. (2d), p. 577) and relied upon the principle stated by this Court in the *Arizona Case.*

It seems clear that if (as was thus held) the general modification of 1922 did not deprive rates prescribed or approved by the Commission prior thereto of their Commission-made character, when applied and collected subsequent to the change, then equally the general changes of 1918 and 1920 were also inoperative to deprive a rate approved by the Commission prior thereto of its status as a Commission-made rate. The Supreme Court, this Circuit Court, and the special District Court for Arizona have all declared, either expressly or by refusal to give heed to the opposing view urged by interested parties, that the general modification of 1922 did not render a previously approved or prescribed rate any less "Commission-made". To the extent that the *Eagle Case* declares and relies upon a contrary principle, to sustain an award of reparation against a rate previously approved, it is in conflict with the decisions of the Supreme Court and of this Court in the *Arizona Case* and the *Wholesale Grocery Case,* and of the District Court for Arizona in the *El Paso and Southwestern*

Case, and therefore of no value as an authority in the instant proceeding.

(b) The effectiveness of the finding in Docket 6806, approving the rates, was not destroyed by the lapse of the time intervening prior to the charging of the assailed rates.

It may nevertheless be argued that even if the Commission's finding in Docket 6806 be construed as an approval of the rates in effect at the date of the decision, nevertheless it lost its effective force after two years, and is therefore wholly inoperative to bar the subsequent awards of reparation here in suit. Such argument would undertake to distinguish between the instant case and the *Arizona Case,* in that there the decision prescribing the rates for the future, against which reparation was later awarded, was rendered in 1921. We anticipate that plaintiffs may point to the fact that *prior* to 1920, an *order* of the Commission prescribing rates for the future could not, under Section 15 of the Act, continue in effect for more than two years from its date; whereas, under the Act as amended in 1920, an affirmative order prescribing future rates may now continue in effect for an indefinite period, and until changed. It may be noted that the Circuit Court, in deciding the *Eagle Case,* relied to some extent upon this consideration (51 F. (2d), p. 444).

It is our position that this argument, if it be made, is legally untenable and essentially illogical, and that the *Eagle Case,* to the extent that it appears to support that argument, is erroneous because in conflict with controlling decisions of the Supreme Court.

It should be noted that defendants do not rely at all upon the *order* made in Docket 6806. Their defense is based upon the express *finding* there made by the Commission, particularly as that finding was addressed to the rate made effective, during the pendency of the case, to Tucson. The Commission's *order* in Docket 6806 (R. 136-137) related entirely to rates *for the future* to *Phoenix and Prescott,* neither of which points is involved as the destination of any of plaintiffs' shipments. While the order refers to and by such reference includes the opinion, the context makes it clear that this reference was merely for the purpose of affording proper support, through an express finding of fact, for the affirmative order respecting the future rates to Phoenix and Prescott. No affirmative *order* was made, dealing with the rates to Tucson; and the *finding* contained in the opinion, relating to the rates to that point, was therefore not an essential part of the order.

This Court, in concluding the opinion in the *Wholesale Grocery Case,* pointed out (68 F. (2d), p. 609) that an opinion and an order of the Interstate Commerce Commission are to be read together, and the former is to be treated as part of the latter; but clearly that principle applies only where the opinion and the order both relate to the same subject matter, and are each essential to the other. There may be and frequently are circumstances in which the two must be considered separately. Both the Act, and the decisions of the Supreme Court and the inferior Federal Courts, recognize a substantial distinction

between an *order* of the Commission, which is mandatory, and its *findings,* which are merely directory. The Act itself treats of the two separately. Authority to make findings and to incorporate them in a formal opinion is contained in Section 14 of the Act; whereas Section 15 confers the authority to make orders for the future, while Section 16(1) authorizes the making of orders for the payment of reparation. Moreover, the Commission may, and in many instances does, write an opinion, incorporating therein formal findings, but forbears to make any order. Such action was taken in two proceedings which are referred to frequently in the record (R. 16, 127, 214, 215) in the instant case:

Reduced Rates 1922, supra;
Arizona Corp. Comm. v. A. E. R. Co. (1926), 113 I. C. C. 52.

The Commission also follows the rather common practice of making orders, without any accompanying opinions or findings. Such orders are not officially reported, and therefore no examples are available to be cited here; but every practitioner before the Commission is familiar with this practice.

The essential distinction between the Commission's findings and its orders has been recently emphasized by the Supreme Court, in

U. S. v. A. B. & C. R. Co. (1931), 282 U. S. 522.

That case arose out of an attempt by a carrier to enjoin an alleged *order* of the Commission in a pro-

ceeding in which it was affected. It appeared that no *formal order* had been made, and that the Commission had merely rendered an *opinion,* containing certain *findings* to which the carrier objected. The Supreme Court held that the opinion and the findings were not an order, and therefore not subject to injunction proceedings under the Act of June 18, 1910 (37 Stat. 539). It said (527):

> "* * * The action here complained of is not in form an order. It is a part of a report—*an opinion as distinguished from a mandate. The distinction between a report and an order has been observed in the practice of the Commission ever since its organization*—and for compelling reasons. Its functions are manifold in character. In some matters its duty is merely to investigate and to report facts. See *United States v. Los Angeles & Salt Lake R. Co.,* 273 U. S. 299, 310. In others, to make determinations. See *Great Northern Ry. Co. v. United States,* 277 U. S. 172. In some, it acts in an advisory capacity. Compare *Minneapolis & St. Louis R. Co. v. Peoria & Pekin Union Ry. Co.,* 270 U. S. 580, 584-5. In others in a supervisory. *Even in the regulation of rates,* as to which the Commission possesses mandatory power, *it frequently seeks to secure the desired action without issuing a command.* In such cases it customarily points out in its report what the carriers are expected to do. *Such action is directory as distinguished from mandatory.* No case has been found in which matter embodied in a report and not followed by a formal order has been held to be subject to judicial review" (emphasis supplied).

In

Brady v. Interstate Commerce Commission (1930), 43 F. (2d) 847 (affirmed, *per curiam:* 283 U. S. 804),

the District Court for the Northern District of West Virginia (three Judges sitting), speaking through Circuit Judge Parker, emphasized the distinction between the *findings,* upon which the reparation order complained of was based, and the *order* itself, saying (850):

> "We think it clear that the suit should be dismissed. In the first place, it is clearly not a case 'brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission', to use the language of the section relied on; for the reason that it seeks not to set aside the *order* of the Commission, but to correct alleged errors in the *findings* of the Commission upon which that order is based. The order of the Commission is that which commands the railroads to pay complainant the sum of $12,838.31 by way of reparation, not the recitals of findings of fact. *An 'order' is a 'mandate, precept; a command or direction authoritatively given; a rule or regulation'. Black's Law Dictionary;* 46 C. J. 1131; 42 C. J. 464. *An order of the Commission is analogous to the judgment of a court; and it is well settled that the findings upon which a judgment is based constitute no part of the judgment itself even though incorporated in the same instrument.* 15 R. C. L. 570; *Judge v. Powers,* 156 Iowa 251, 136 N. E. 315, Ann. Cas. 1915B, 280. As said by Judge Learned Hand in *Eckerson v. Tanney* (D.

C.), 235 F. 415, 418, 'The judgment itself does not reside in its recitals, but in the mandatory portions'. It has been expressly held that *findings of the Commission embodied in its reports are not orders within the meaning of the statutes relating thereto"* (emphasis supplied).

Other cases to the same effect include:

American Sugar Refining Co. v. D. L. & W. R. Co. (C. C. A. 3rd, 1913), 207 Fed. 733 (740-741);

C. B. & Q. R. Co. v. Merriam (C. C. A. 8th, 1922), 297 Fed. 1 (3-5).

In view of these controlling decisions, it seems unnecessary to discuss the distinction further; but it may be observed that whereas the Commission's *findings,* contained in its opinions, are subsequently published in the bound volumes of the Commission's reports and thus, under Section 14 of the Act, become matters of judicial notice, the *orders* (except in "finance docket" cases) are not customarily carried into the published reports, do not appear in the bound volumes of the Commission's decisions, and therefore receive judicial notice only if properly brought before the Court as a part of the record, as has been done (R. 8-36, 128-197) with certain of the reports relied upon by the parties in the instant case.

The essential reason for drawing this sharp distinction between the finding in Docket 6806, as it related to the rate to Tucson, and the order there entered, which related only to the rates to Prescott and Phoenix, is to demonstrate that the two-year limita-

tion did not apply to the finding upon which defendants rely. Section 15 of the Act, which authorized the making of the order, also contained the express limitation that the order so made could have an effective life of not more than two years; and indeed that limitation was explicit in the order (R. 137). No such limitation was contained in Section 14 of the Act, as it read in 1915, and no such limitation now appears in that section. No such limitation appears in the opinion in which the findings relating to the rates to Tucson and other destinations, other than Prescott and Phoenix, were incorporated. The two being essentially distinct, and *the findings in particular being in no wise dependent upon the order,* it should be clear, without any necessity to cite authorities further, that the limitation did not and was not intended to apply to those findings. However, decisions of the Supreme Court specifically sustain our view that the two-year limitation, upon orders for the future as it existed prior to 1920, had no application to findings made by the Commission. In

S. P. Co. v. Interstate Commerce Commission (1911), 219 U. S. 433,

one of the questions directly presented and passed upon was whether the limitation applied to the Commission's findings, as well as to its orders, in such manner as to render moot a suit involving the validity of one of its decisions, which suit had not reached final determination within the two-year period. The Supreme Court held directly that the limitation did not govern, saying:

"The considerations just stated dispose of the entire controversy except in one particular. It is claimed at bar that the questions arising for decision are moot, since in consequence of the lapse of more than two years since the order of the Commission became effective, by operation of law the order of the Commission has spent its force, and therefore the question for decision is moot. The contention is disposed of by *Southern Pacific Terminal Co. v. Interstate Commerce Commission,* this day decided *post,* p. 498. In addition to the considerations expressed in that case it is to be observed that clearly the suggestion is without merit, in view of the possible liability for reparation to which the railroads might be subjected if the legality of the order were not determined and the influence and effect which the existence of the rate fixed for two years, if it were legal, would have upon the exercise by the railroads of their authority to fix just and reasonable rates in the future, clearly causes the case to involve not merely a moot controversy."

In

Southern Pacific Terminal Co. v. Interstate Commerce Commission (1911), 219 U. S. 498,

there was also involved the question of the validity of a decision rendered in 1908, when the Act contained the two-year limitation upon orders. It was contended that since the two-year period had passed, the case had become moot. The Supreme Court said (515):

"In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration.

> The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress."

The decision in the *A. B. & C. Case,* supra, also indicates that the *findings* of the Commission, addressed to existing or future rates, considered apart from its *orders,* themselves possess sufficient force to constitute a determination of the matters with which they deal; and this principle is further sustained by other decisions. In

> *Western Paper Makers' Chemical Co. v. U. S.* (1926), 271 U. S. 268,

the Supreme Court discussed the effect to be given to an administrative determination by the Commission, saying (270-271):

> "* * * Counsel agreed upon a short statement of the whole evidence sufficient to enable this court to consider whether there was any evidence to support the *findings* of the Commission.
>
> The objections as presented here in brief and argument were addressed mainly to the soundness of the reasoning by which the Commission reached its conclusions. It was urged that these are inconsistent with conclusions reached by it in similar cases; that the *findings* are inconsistent with some views expressed in its reports in this

proceeding; that some evidence was improperly considered; and that inferences drawn from some of the evidence were unwarranted. These objections we have no occasion to discuss. The determination whether a rate is unreasonable or discriminatory is a question on which the *finding* of the Commission is conclusive if supported by substantial evidence, unless there was some irregularity in the proceeding or some error in the application of the rules of law. (Citing cases.) * * * There was ample evidence to support the *finding* that the joint through rates regarded as entireties were reasonable and justified" (emphasis ours).

In

Virginian R. Co. v. U. S. (1926), 272 U. S. 658, the Court discussed the conclusive effect of a finding relating to future rates, saying (665-666):

"The Virginian contends that the evidence before the Commission does not support its *finding* that the rates on coal from the Virginian's mines * * * are unreasonable * * * The *finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal 'informed by experience'.* * * * This court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with *findings* made in other proceedings before it * * * This fact, and much else in the voluminous record, affords substantive evidence to support the *finding* that the existing rates are unreasonable and that those which the order directs are reasonable" (emphasis ours).

The Commission has itself declared that its findings are binding upon the parties, even where not accompanied by orders. In

Owensboro Wheel Co. v. Director General (1922), 69 I. C. C. 503,

the Commission referred to its report in a prior proceeding, saying (506):

> "Defendants apparently consider that our findings in that case were not binding upon the carriers, because no order was entered therein; but in view of the nature of that proceeding the contention is without merit."

To the same effect, see, also:

Fels & Co. v. Penn. R. Co. (1912), 23 I. C. C. 483 (486-487).

The text of the opinion in the *Eagle Case* shows that the Court completely overlooked the distinction between the Commission's findings and its orders, in reaching its conclusion. The decision proceeds upon the assumption that the carriers were relying, not upon a *finding,* but upon an *order* made in 1915. Obviously it is not in point here. If, however, the decision is to be construed as declaring that, because of the statutory limitation upon orders, a *finding* made by the Commission prior to 1920 lost its validity, and was of no avail after two years, it is squarely in conflict with the above decisions of the Supreme Court, and therefore erroneous; and it cannot be accorded controlling effect in the instant case.

The opinion in the *Eagle Case* loses sight also of the well-understood principle of law, frequently an-

nounced by the Supreme Court, that when the Commission, acting in its administrative capacity, makes a determination regarding the reasonableness of a particular rate *for future application,* that determination is conclusive until thereafter changed *for the future,* provided the Commission has proceeded upon the basis of at least some evidence, and has not exceeded the powers conferred by Constitution or statute; and that a rate prescribed or approved pursuant to that determination is *conclusively* presumed to be lawful, until the Commission thereafter makes some further determination. More briefly stated, the rule is that a Commission-made or approved rate, as applied to traffic moving after the Commission has rendered its decision and until a further decision is made, carries with it a *conclusive* presumption of lawfulness. That principle is inherent in the decision in the *Arizona Case;* indeed, it is the basis for the conclusion that the Commission, acting in a quasi-judicial capacity to award reparation, "was bound to recognize the validity of the rule of conduct prescribed by it", in its administrative capacity, "and not to repeal its own enactment with retroactive effect". Leading cases which declare this basic principle include:

Interstate Commerce Commission v. Union Pac. R. Co. (1912), 222 U. S. 541 (547, 548);

Western Paper Makers' Chemical Co. v. U. S., supra;

A. T. & S. F. Ry. Co. v. U. S. (1914), 234 U. S. 294 (311);

Virginian R. Co. v. U. S., supra.

It will be observed that some of these cases were decided prior to 1920, when the two-year limitation upon orders for the future appeared in the Act, and others since that time; but the principle they announce does not vary. The decision in the *Arizona Case* follows the same principle, and makes it quite clear that a decision of the Commission prescribing or approving rates for the future confers upon the rates so approved or prescribed a conclusive presumption of reasonableness, as long as the Commission's determination remains unchanged. The decision in the *Eagle Case* disregards entirely this established principle. It proceeds upon the directly contrary theory that when the Commission, having approved a rate for future application, thereafter takes *no* action, the conclusive presumption of reasonableness nevertheless vanishes after two years, and the approved rate may then be found to have been unreasonable, and made the subject of a reparation order, even though the carriers have continued to apply the rate *as approved,* without any change other than those properly authorized or required by competent governmental authorities. The decision in the *Eagle Case* thus clearly conflicts with the principles laid down by the Supreme Court in the decisions cited and in numerous others, and particularly with the basic principle of the *Arizona Case.* For this additional reason, therefore, the *Eagle Case* cannot be regarded as a controlling authority in the premises.

We anticipate that it may possibly be asserted that the *Eagle Case* has acquired the status of a decision approved by the Supreme Court, for the reason that

certiorari was denied. It is well established that denial, by the Supreme Court, of a writ of certiorari imports no expression of opinion upon the merits of the case, and does not operate in any sense as an affirmance.

U. S. v. Carver (1921), 260 U. S. 482 (490);
Hamilton Shoe Co. v. Wolf Bros. (1916), 240 U. S. 251 (258).

We ask the Court to conclude that the *Eagle Case* is not a controlling precedent in this case, for the reasons above set forth, and that the trial Court, to the extent that its decision was influenced thereby, committed material error requiring reversal of the judgments.

II.

THE RATES AND CHARGES ASSESSED UPON THE SHIPMENTS UPON WHICH REPARATION IS CLAIMED WERE NOT UNREASONABLE.

1. The substantive issue of the reasonableness of the rates as charged was properly presented for determination by the trial Court. That determination may be reviewed by this Court upon this appeal.

Before entering into our discussion of the character and legal sufficiency of the evidence received at the trial, we shall call attention to certain general provisions of law relating to the conduct and decision of reparation proceedings.

The instant suits are "reparation suits", of the type contemplated and provided for by Section 16(2) of the Interstate Commerce Act (49 U. S. Code, Sec-

tion 16-2). So far as material here, that section provides:

> "If the carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file * * * a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the Circuit (now District) Court of the United States shall proceed in all respects like other civil suits for damages, except that *on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated* * * *" (emphasis ours).

The Supreme Court and the inferior Federal Courts, in a series of cases, have held in effect that that statute preserves for the defendant carrier the right to a trial *de novo, in court,* upon the substantive issue whether the rates attacked for reparation purposes were unreasonable or otherwise in violation of law, and that in such trial the findings and order of the Commission are mere *prima facie* evidence.

In

Meeker v. Lehigh Valley R. Co., supra,

the Court said (236 U. S., at p. 430):

> "It is also urged, as it was in the courts below, that the provision in Sec. 16 that, in actions like this, 'the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated' is repugnant to the Constitution in that it infringes upon the right of trial by

jury and operates as a denial of due process of law.

This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most therefore it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents" (emphasis ours).

In

Spiller v. A. T. & S. F. Ry. Co. (1920), 253 U. S. 117,

the Court referred to the *Meeker Case,* saying (131-132):

"And the fact that *a reparation order has at most only the effect of prima facie evidence* (citing cases), *being open to contradiction by the carrier when sued for recovery of the amount awarded,* is an added reason for not binding down the Commission too closely in respect of the character of the evidence it may receive * * *" (emphasis ours).

In

Lewis-Simas-Jones Co. v. S. P. Co., supra,

the Court again referred to the *Meeker Case,* saying (283 U. S., at pp. 660-661):

"The Act does not create a cause of action based on the Commission's findings and reparation order for the recovery of money collected as freight charges based on rates alleged to be unjust and unreasonable. It makes a determination by the Commission of the unreasonableness

of the rate attacked and the extent that it is, if at all, excessive a condition precedent to suit.

Section 16(2) provides that, if the carrier shall not comply with an order for the payment of money within the time specified, the person for whose benefit it was made may file in the district court of the United States 'or in any state court of general jurisdiction' a petition setting forth briefly 'the causes for which he claims damages and the order of the Commission', and that the suit in the United States court shall proceed in all respects 'like other civil suits for damages' except that the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated. The section contains nothing relating to evidence or procedure in state courts. *It is clear that the action is not on the award as such"* (emphasis supplied).

A rather full discussion of the nature of a reparation suit is contained in the very recent decision in:

B. & O. R. Co. v. Brady (1933), 288 U. S. 448.

In that opinion the Court said (457-458):

"This is not a suit authorized by Sec. 9 but one brought under Sec. 16(2) because of defendants' refusal to comply with the Commission's order. Subject to *the right of contestation preserved by the Act* (*Meeker v. Lehigh Valley R. Co.,* 236 U. S. 412, 430) it is a suit for the enforcement of the award. Sec. 16(3) (f). *Lewis-Simas-Jones Co. v. Southern Pacific Co.,* 283 U. S. 654, 661. Section 16(2) does not permit suit in the absence of an award, and if the Commission denies him relief, a claimant is remedi-

less. *Standard Oil Co. v. United States,* 283 U. S. 235. *Brady v. United States,* 283 U. S. 804. *Bartlesville Zinc Co. v. Mellon,* 56 F. (2d) 154. No suit is permitted if the carrier pays the award. *Louisville & N. R. Co. v. Ohio Valley Tie Co.,* 242 U. S. 288. *Cf. Penna. R. Co. v. Clark Coal Co.,* 238 U. S. 456. Plaintiff may not adopt the award as the basis of his suit and then attack it. *Cf. Mitchell Coal Co. v. Penna. R. Co.,* 230 U. S. 247, 258.

The fact that *the Act* merely makes the findings and report of the Commission *prima facie* evidence and so *preserves the defendant's right to contest the award* gives no support to plaintiff's contention that it does not bind him. It is to be remembered that, by electing to call on the Commission for the determination of his damages, plaintiff waived his right to maintain an action at law upon his claim. But the carriers made no such election. Undoubtedly it was to the end that they be not denied the right of trial by jury that *Congress saved their right to be heard in court upon the merits of claims asserted against them''* (emphasis ours).

In an early case under the Act, the carriers' (and the shippers') right to introduce additional evidence dealing with the ultimate issues, and thus in effect to have a trial *de novo,* was recognized.

In

C., N. O., & T. P. Ry. Co. v. Interstate Commerce Commission (1896), 162 U. S. 184,

the Supreme Court said (196):

''The theory of the Act evidently is, as shown by the provision that the findings of the Com-

mission shall be regarded as *prima facie* evidence, that the facts of the case are to be disclosed before the Commission. *We do not mean, of course, that either party, in a trial in the Court, is to be restricted to the evidence that was before the Commission * * *"* (emphasis ours).

In

Pittsburgh & W. V. Ry. Co. v. United States (1924), 6 F. (2d) 646,

the District Court for the Western District of Pennsylvania (three Judges sitting) held, in an opinion written by Circuit Judge Wooley, that an injunction would not lie against the enforcement of a reparation order, for the reason that the carriers were enabled, under the law, to have a full trial of the issues of fact. The Court said (648):

"An order of the Commission awarding reparation is not a cause of action. Nor is it in the nature of a judgment on which execution may issue. It is an award of money damages and is declared by statute to be evidence, and then only *prima facie* evidence, of the facts found by the Commission (section 16 of the Interstate Commerce Act of February 4, 1887 (24 Stat. 379), as amended by section 13 of the Act of June 18, 1910 (36 Stat. 539, (Comp. St. Sec. 8584)), to be used only as such in an action which may be instituted after default by a carrier to obey the order of payment. *The provision in section 16* of the Act that, 'the findings and order of the Commission shall be prima facie evidence of the facts therein stated' *has been held* by the Supreme Court *only to establish a rebuttable presumption"* (emphasis ours).

In

Brady v. Interstate Commerce Commission, supra,

the Court announced conclusions consistent with the decisions above cited. After referring to the opinion in the *Pittsburgh Case,* the Court quoted (43 F. (2d), p. 852) a portion of the opinion in the *Meeker Case,* and said further:

> *"If therefore the carrier deems the order erroneous, it has full opportunity to correct the error or defend against it upon the trial.* * * * The order and findings of the Commission are *prima facie* evidence, just as is the report of an auditor in an action at law" (emphasis ours).

In

Blair v. Cleveland, C., C. & St. L. Ry. Co. (1931), 45 F. (2d) 792,

the Court said (793):

> "Under section 16 of the statute the findings and order of the Commission are *prima facie* evidence of the facts therein stated. The effect of this statute is as stated by *Meeker v. Lehigh Valley Railroad Co.,* 236 U. S. 414, 35 S. Ct. 328, 59 L. Ed. 644, Ann. Cas. 1916B, 691, to establish a rebuttable presumption, cutting off no defense, and taking no question of fact from either court or jury. It merely creates a rule of evidence and does not abridge the rights of either party. To the same effect are *Mills v. L. V. R. R. Co.,* 238 U. S. 473, 35 S. Ct. 888, 59 L. Ed. 1414; *Pittsburgh & W. V. Ry. Co. v. United States* (D. C.) 6 F. (2d) 646; and *Missouri, K. & T. R. Co. v. Interstate Commerce Commission* (C. C.), 164 F. 645.

The hearing in this court is de novo, and the court is entitled to receive and consider evidence in addition to that before the Commission, but the prima facie case made out by the findings and order of the Commission will prevail unless overcome by evidence submitted by defendants'' (emphasis ours).

In

Atlantic Coast Line R. Co. v. Smith Bros. (C. C. A., 5th, 1933), 63 F. (2d) 747; (certiorari *denied,* May 29, 1933; 289 U. S. 761),

the Court said (748):

"The prima facie effect which the statute accords to the findings and orders of the Commission (in a reparation case) * * * is of course rebuttable * * *; but until rebutted it does make out a case * * *'' (citing, among others, the *Meeker,* and *Blair Cases,* supra, and the *Sou. Ry. Case,* infra).

To the same effect, see:

Southern Ry. Co. v. Eichler (C. C. A. 8th, 1932), 56 F. (2d) 1010 (1018).

At the trial of these cases, counsel for plaintiffs did not dispute the propriety of a determination by the trial Court of the substantive issue of the reasonableness of the rates charged apparently recognizing the controlling effect of the decisions above cited. This attitude was consistent with the position taken by the same counsel, then representing the Arizona Grocery Company, at all stages of the *Arizona Case.* Indeed, plaintiffs offered evidence in addition to the Commission's opinion and order (Exhibit 5, and the accom-

panying testimony of Witness Reif: R. 218-224) which could have had no other purpose than to support their major allegations of fact, thus plainly indicating that counsel considered that the issue was open, and that the trial was *de novo.*

Nevertheless, we anticipate that it may possibly be argued, upon this appeal, that the Commission's purported determination of the unreasonablenes of the rates charged must now be regarded as conclusive, there having apparently been at least *some* evidence before the Commission upon which that determination was based. In this behalf reference may be made to two recent decisions:

> *South Carolina Asparagus Growers Ass'n v. Southern Ry. Co.* (C. C. A., 4th, 1933), 64 F. (2d) 419;

and

> *Glenns Falls Portland Cement Co. v. D. & H. Co.* (C. C. A., 2nd, 1933), 66 F. (2d) 490.

An examination of these opinions will indicate that in both, the view that the Commission's findings are conclusive, *in reparation suits,* was based upon excerpts from the opinion in:

> *Mitchell Coal Co. v. Pennsylvania R. Co.* (1913), 230 U. S. 247,

the language relied upon being found principally at pages 257 and 258 of that opinion. The Supreme Court there said, in part, that the shipper's right to sue at common law for the charging of unreasonable rates in the past was abrogated by the Interstate Commerce Act; and a right was given which, as a

condition precedent, required a finding of unreasonableness by the Commission. It then said, further, that orders of the Commission

> "so far as they are administrative are conclusive, whether they relate to past or present rates, and can be given general and uniform operation, since all shippers, who have been or may be affected by the rate, may take advantage of the ruling and avail themselves of the reparation order. They are quasi-judicial and only *prima facie* correct, in so far as they determine the fact and amount of damage—as to which, since it involves the payment of money and taking of property, the carrier is by Section 16 of the Act given its day in court, and the right to a judicial hearing."

The opinion in the *Glenns Falls Case* also refers to and relies upon the decision in:

Adams v. Mills (1932), 286 U. S. 397 (410).

We think that it should be clear, upon analysis, that these two decisions of the Circuit Courts cannot be regarded as well-reasoned or controlling. They fail completely to give any effect to the most important statements contained in the *Mitchell Case;* namely, that reparation orders of the Commission are quasi-judicial, and only *prima facie* correct, in so far as they determine the *fact* and amount of damage, and the carrier is by statute given its day in Court, and *the right to a judicial hearing.* Moreover, they appear to disregard entirely the more recent *Meeker* and *Lewis-Simas-Jones Cases,* in which the Supreme Court declared that the statute constitutes only a *rule of evi-*

dence, under which a mere *rebuttable presumption* in favor of the claimant is created, and that no question of fact is taken from either Court or jury. They likewise overlook the express provision of the statute, also emphasized in these decisions, that the suit shall proceed in *all respects like other civil suits for damages.* Finally, they fail to consider the affirmance of these principles, and the outright statement of the Supreme Court that the carrier's right of defense is in no wise impaired, in the most recent decision in point:

B. & O. R. Co. v. Brady, supra.

It is of interest to note that the Circuit Court for the Second Circuit admits (66 F. (2d), at p. 494), that the Federal Courts are not in unanimity upon this question, particular reference being made to the *Blair Case,* above cited.

The view stated in the *South Carolina* and *Glenns Falls Cases* loses sight of the essential distinction between orders of the Commission operating *for the future,* which are *legislative* in character, and *conclusive* against attack in the Courts, provided only that they are jurisdictionally made and supported by at least some competent evidence; and findings and orders *for reparation,* which operate only upon *past* transactions, are *quasi-judicial* in character, and are specifically given mere *prima facie* effect by the statute and the controlling decisions. The essential distinction between these two types of orders has frequently been stated; for example, in the *Mitchell Case* (230 U. S., p. 259), the *Arizona Case* (284 U. S., pp. 388-389); and in

Baer Bros. v. D. & R. G. R. Co. (1914), 233 U. S. 479 (486);

Great Northern Ry. Co. v. Merchants Elevator Co. (1922), 259 U. S. 285 (291).

The interpretation advanced in these two cases likewise loses sight of the possible unconstitutionality of the statute, if it should be so construed and applied as to cut off the right of the defendants to a trial of the issues of fact before a jury. The opinion in the *Meeker Case* shows that this consideration strongly influenced, if it did not control, the conclusion therein, the Court apparently taking the view announced in its own decisions, that the statute should be so construed, if possible, as to avoid bringing it into conflict with the Constitution:

Harriman v. I. C. C. (1908), 211 U. S. 407 (422);

Ann Arbor R. Co. v. U. S. (1930), 281 U. S. 658 (669).

It will hardly be questioned that the substantive issue is properly presented by the pleadings. The complaints allege, if not directly at least by reasonable inference, that the rates against which reparation is sought were unreasonable, in violation of the Interstate Commerce Act (R. 3-4, 44) and that plaintiffs were damaged by their assessment and collection, and the refusal of defendants to pay reparation (R. 6-7, 47). The answers, as amended, specifically deny (R. 58-59, 64) that the rates were unreasonable or otherwise unlawful; and allege further, as a matter of

affirmative defense (R. 62, 66-67), that each and all of said rates were at all times reasonable, and in full conformity with the requirements of the Act.

Both the plaintiffs and the defendants proposed findings (Plaintiffs' Proposed Finding No. X in Case No. L-738: R. 74-75; Plaintiff's Proposed Finding No. VI in Case No. L-844: R. 83; Defendants' Proposed Finding No. 16: R. 246-247) to cover this issue. The Court rejected defendants' proposed finding (R. 247), and adopted a finding substantially as proposed by plaintiffs (R. 255) to the effect that the freight charges as assessed were unjust and unreasonable. Defendants duly excepted to the latter finding, and assigned error (Assignment of Error No. 19: R. 298), upon the ground that the Court's finding was not supported by competent evidence, and was and is wholly contrary to the uncontradicted evidence. Defendants likewise moved for a nonsuit at the conclusion of plaintiffs' testimony in chief, which motion was denied, and exception duly saved (R. 126-127). The issue is thus properly before this Court for its determination.

Maryland Casualty Co v. Jones (1929), 279 U. S. 792;

Fleischmann Co. v. U. S. (1926), 270 U. S. 349 (356).

Particularly, the instant cases being actions to enforce reparation awards, this Court has a right to examine the record here before it in order to determine whether the findings and orders in suit were properly made, in the light of that record.

In

Southern Ry. Co. v. Eichler, supra,

the Court said (56 F. (2d), pp. 1018, 1019):

> "This appeal is to review the judgment of the District Court in a suit to enforce an order of the Interstate Commerce Commission. In that action the order of the Commission is made *prima facie* evidence of the findings made by it. *It is for this reason that appellate courts have a duty to examine the evidence for the purpose of ascertaining whether such findings are substantially supported;* and, in so doing, they are confined to the record presented for review. In that record we find the order of the Commission sought to be enforced, *the testimony of witnesses introduced at the trial* * * * We are not permitted to go outside that record on this appeal * * * *We have carefully considered the evidence preserved and presented for review* * * *" (emphasis supplied).

It may be added that the Court, upon such review, after an exhaustive examination of the record, reversed the District Court's judgment, and in so doing also reversed, in effect, the Commission's findings and order.

We ask this Court to conclude that the determination of the substantive issue of the reasonableness of the rates was not foreclosed or precluded, by reason of the finding and orders upon which the suits are predicated; that in these suits an independent reëxamination of that issue may be made by the trial Court, upon the evidence introduced before that Court; that such reëxamination by the trial Court may be

thereafter reviewed upon appeal; and that the issue is properly before this Court for review, upon this appeal.

2. Plaintiffs' evidence is wholly inadequate, as a matter of law, to support the trial court's finding and conclusion that the rates and charges in issue were unreasonable.

The evidence offered by plaintiffs, and relied upon by the trial Court to support its findings and conclusions, consisted principally of the following:

(a) The Commission's opinion in the *Third Phoenix Case,* containing the finding that the rates in issue, as applied, were unreasonable (Plaintiffs' Exhibit 1: R. 8-27);

(b) The reparation orders, dated Sept. 7, 1929, and April 13, 1931, in favor of these plaintiffs and certain other shippers (Plaintiffs' Exhibits 2 and 3: R. 40-41, 52-53);

(c) Plaintiffs' Exhibit 5, and the accompanying oral testimony of Witness Reif (R. 218-224).

The balance of plaintiffs' showing consisted of the Rule V statements (Plaintiffs' Exhibit 4: R. 37, 49-50, 125), which show simply the details of the shipments upon which reparation is sought, but otherwise establish no legal liability, apart from the finding and orders.

We shall first discuss the value, as *prima facie* evidence, of the Commission's finding in the *Third Phoenix Case,* and thereafter the competency, and evidentiary value otherwise, of the showing made through Witness Reif.

(a) The Commission's finding in the Third Phoenix Case is partially invalid, under various court decisions, and therefore incompetent and inconsistent in its entirety.

The direct finding of the Commission with respect to reparation, upon which the reparation order here in suit is predicated, appears near the conclusion in the opinion in the *Third Phoenix Case,* and so far as material here reads as follows (R. 25-26):

> "* * * We further find that the assailed rates, minimum 60,000 pounds, from California points were, are, and will be unreasonable to the extent that they exceeded, exceed, or may exceed, respectively, the following, in cents per 100 pounds:
>
> Prior to July 1, 1922, to Phoenix 79 cents from the southern California group and 81 cents from the northern California group and to Bowie 83 cents from the southern California group and 93 cents from the northern California group; *on and between July 1, 1922, and the effective date of the rates herein prescribed* for the future, *from the southern California group and the northern California group, respectively,* 66 and 66 cents to Yuma, 68 and 69 cents to Kingman, 71 and 73 cents to Phoenix, *73 and 77 cents to* Prescott, Williams, *Tucson,* Flagstaff, and Clarkdale, 75 and 84 cents to Winslow, Holbrook, Bisbee, Bowie, and Douglas, 77 and 87 cents to Safford, and 79 and 89 cents to Gallup, Clifton, and Globe * * *" (emphasis ours).

The Commission also, and at the same time, made formal findings (R. 26) with respect to the levels of the rates for the future, and in the orders accompanying the opinion (R. 28-36) required such rates to be published.

Even a superficial review of the opinion in the *Third Phoenix Case* will convince the Court that the Commission was there attempting, upon the basis of what was referred to (R. 25) as the first comprehensive record upon the subject ever before it, to fix a complete and properly related structure of rates on sugar, both past and future, from California producing points to *all* the principal Arizona destinations. The rates found reasonable for the past (i. e., for reparation purposes) were no less related to each other, having in mind the different distances to the various points (as shown in the decision itself: R. 22), and their competitive relationships, than were the corresponding rates prescribed for the future. Higher rates were therefore prescribed for the longer hauls to points in eastern Arizona, such as Globe, Clifton, Holbrook, Bowie, Bisbee, and Douglas, with somewhat lower rates to less distant points such as Clarkdale and Tucson, and still lower rates to Phoenix. Points to which the distances were approximately the same were grouped on the same rate-basis: e. g., Globe with Clifton, Bisbee and Douglas with Bowie, Tucson with Clarkdale and Prescott. Phoenix, the capital and the largest city of the state, was treated more or less as a key point, particularly since the rates to Phoenix had *twice* been prescribed in comparatively recent cases: and the other rates were quite obviously graded, distance being duly considered, upon levels either higher or lower than the Phoenix rates. It is plain that the finding was carefully worked out so as to produce what the Commission considered to be a harmonious, consistent, and

correctly related rate-structure; and that no part of the finding, relating to any one point, could properly be dissociated from the rest and given separate effect. Indeed, the very text of the finding demonstrates that no separate and individual finding as to any of the points involved, particularly Tucson, was either made or intended. All of the destinations covered by the finding were mentioned *in the same sentence,* and Tucson was grouped with *four* other points; indeed, such grouping was generally followed as to most of the destinations.

(1) The reparation finding is invalid and incompetent because predicated upon a demonstrated misconception of law.

The Court is now confronted with the fact that this finding, together with certain of the reparation orders issued pursuant thereto, has been declared void, because in excess of the Commission's jurisdiction, in so far as it attempted to award reparation upon shipments which moved to Phoenix, Globe, Safford and Clarkdale. Such is the express legal effect of the decisions of the Supreme Court in the *Arizona Case,* of this Court in the *Wholesale Grocery Case,* and of the District Court for Arizona in at least one case involving shipments to Clarkdale: *T. F. Miller Co. v. A. T. & S. F. Ry. Co.,* No. L-824-Phoenix (decided April 15, 1933). No appeal was taken by the plaintiff in the case last mentioned, and the decision therein has become final.

These decisions establish that the Commission, in making its reparation finding, proceeded upon a complete misconception and misapprehension of its powers under the law. The Supreme Court expressly

said, in the *Arizona Case* (284 U. S., p. 389) that the Commission "in its report *confuses legal concepts*"; that the Commission's *error* arose from a failure to recognize" the essential distinction between its legislative function of prescribing future rates, and its quasi-judicial function of awarding reparation. This Court, in the *Wholesale Grocery Case,* emphasized (68 F. (2d), p. 604) the identity of origin of that case and the *Arizona Case,*

> "because we are now being called upon to pass upon *a misconception of the Commission regarding its powers that has already been clearly pointed out by the Supreme Court*" (emphasis ours).

That misconception, as this Court has recognized, pervades the entire finding in the *Third Phoenix Case,* upon which plaintiffs' suits here must depend. It invalidates that finding in its entirety, not merely as to the points where the rates were prescribed or approved in the *First Phoenix Case,* the *Graham Case,* the *Douglas Case*[5], and the *United Verde Case*[6], but as to *all* points. It is inconceivable that the Commission, if it had realized at the time that it was barred by law from awarding reparation on shipments to Phoenix, Globe, Clarkdale, Safford, and (by a parity of reasoning) Douglas, would nevertheless have awarded such reparation on shipments to a related

5. *Douglas Chamber of Commerce, etc. v. A. T. & S. F. Ry. Co.* (1921), 64 I. C. C. 405. A copy of the report and order is in evidence as Defendants' Exhibit C (R. 150-174).

6. *United Verde Ext. Mining Co. v. A. T. & S. F. Ry. Co.* (1924), 88 I. C. C. 5; in which the Commission specifically found reasonable a rate of 86½ cents on sugar from California points to Clarkdale, made effective Oct. 16, 1922 (see Plaintiffs' Exhibit 1:R. 14-15).

point of approximately equal distance, such as Tucson. The whole decision shows that it was the Commission's intention to prescribe, for reparation purposes, a properly related and consistent adjustment, and not the chaotic rate-structure which would result if the finding were held valid as to Tucson, though determined to be legally invalid as to the other destinations. The character of the discriminatory and disordered rate-adjustment which would thus result is set forth on the chart annexed as Appendix A, and is illustrated by the following typical examples:

(a) The rate from northern California points to Clarkdale, on and after January 12, 1924, and until (and after) October 27, 1925, was 84 cents (R. 16). It represented a voluntary reduction below the 86½-cent rate found reasonable in the *United Verde Case*. The contemporaneous rate to Tucson was also 84 cents (R. 16). The distance to Clarkdale was about 820 miles; to Tucson, 847 miles (R. 22). If the reparation awarded on the plaintiffs' 27 shipments which moved during that period from northern California to Tucson is eventually paid, the rate to Tucson points will be retroactively reduced to 77 cents (R. 26, 37, 50), an average reduction of about $43.00 per car; although no such reduction, nor any reduction at all, could lawfully be made upon exactly similar shipments moving from the same points of origin, over the shorter distance to Clarkdale. The report shows (R. 26) that it was the Commission's intention that the rates to Tucson, both for reparation purposes and for the future, should be the *same* as to Clarkdale, instead of substantially *lower*.

(b) The rate from both the northern and southern California groups to Phoenix, during 1923 and prior to January 12, 1924, was 86½ cents. The contemporaneous rate to Tucson was the same. The distances to Phoenix were (R. 22): from the northern California group, about 749 miles; from the southern California group, about 467 miles. The corresponding distances to Tucson were, respectively, about 847 miles and 519 miles. The distances from northern California origins to Tucson were measured over the route of the Santa Fe from Mojave, California, via Barstow, Cadiz, and Parker, to Phoenix, thence via the Arizona Eastern's Phoenix-Maricopa branch, to Maricopa, thence via Southern Pacific to destination. Upon that route, Phoenix was directly intermediate to, and approximately 100 miles *less* distant than, Tucson. If the reparation order is enforced, the rate charged on the seven shipments which moved from northern California points to Tucson during that period will be retroactively reduced to 77 cents, and on the two shipments during that period from southern California points, to 73 cents: thus creating gross discriminations against Phoenix, at which point the corresponding rate cannot be reduced through reparation. This discrimination is accentuated, as to shipments from northern California, by the apparent long-and-short-haul violation. The actual discriminations thus accomplished would amount to about $58.00 per car, on northern California shipments, and about $81.00 per car, on southern California shipments. The actual routes of movement in 1923 and 1924 were practically identical, being over the same rails as far as Mari-

copa, from which the branch-line haul to Phoenix was about 35 miles (R. 11, 12). The report shows that it was the Commission's intention that the rates to Tucson should be higher than the corresponding rates to Phoenix, instead of substantially lower.

(2) The enforcement of the reparation finding and orders would create unlawful discriminations. The finding and orders are therefore invalid, and of no force as evidence to support plaintiffs' contentions.

The anomalous and incongruous results of the enforcement of the reparation order here in suit would be none the less discriminations, of the character condemned by the Act, even though brought into being retroactively, by the enforcement of quasi-judicial orders, rather than by the carriers' voluntary act. The authorities establish that discrimination may be accomplished quite as effectively by the charging of equal amounts for similar services in the first instance, and the subsequent refund, either voluntarily or under judicial compulsion, of a portion of the charges for one service but not for the other, as by the initial charging of unequal amounts. This was precisely the situation involved in:

Wight v. U. S. (1897), 167 U. S. 512,

in which the Supreme Court condemned, *as a discrimination,* a difference in treatment created by the initial charging of the same specified tariff rate to each of two similar and competing shippers, and the subsequent refunding, of a portion of the charges thus collected, to one of the shippers. It was said to be the purpose of the prohibition of discrimination, contained in Section 2 of the Interstate Commerce Act:

> "to enforce equality between shippers; and it prohibits any rebate or other device by which two shippers shipping over the same line and the same distance under the same circumstances of carriage are compelled to pay different prices therefor."

Discriminations of the same kind were discussed in:

Penn. R. Co. v. International Coal Co. (1913), 230 U. S. 184;

and

Mitchell Coal Co. v. Penn. R. Co., supra.

In the *Mitchell Case* it was specifically recognized that a discrimination might be created *retroactively,* by awarding reparation to one shipper but not to another, the Court saying (at p. 259):

> "For, if at the suit of one shipper, a court could hold a past rate or allowance to have been unreasonable and award damages accordingly, it is manifest that such shipper would secure *a belated but undue preference* over others who had not sued and could not avail themselves of the verdict" (emphasis ours).

To the same effect, see:

Texas and Pac. Ry. Co. v. Abilene Cotton Oil Co., supra;

Phillips v. Grand Trunk Ry. Co. (1915), 236 U. S. 662.

An excellent discussion of the manner in which discrimination may be created by the subsequent refunding of a portion of the charges collected upon certain shipments, whereas no such refund is made upon

others moving under similar conditions and at the same rates, is found in:

Union Pac. Ry. Co. v. Goodridge (1893), 149 U. S. 680.

It is very clear that if the carriers created, or even attempted, these discriminations *voluntarily* rather than pursuant to the Commission's quasi-judicial orders, they would arouse instant protest, and incur severe and deserved condemnation. Indeed, an exactly similar discrimination maintained by the carriers was complained of by shippers, and found unlawful by the Commission, which entered a legislative order requiring its termination. In the *First Phoenix Case,* the Commission condemned the rate-adjustment whereby a higher rate was charged on sugar from California to Phoenix, then (1921) a branch-line point, than at Tucson and other more distant main-line points in eastern Arizona, and ordered the Phoenix rates reduced to the main-line basis. The above analysis shows that the enforcement of the reparation order here in suit would nevertheless create again precisely the discrimination found unlawful by the Commission, when maintained by the carriers. It will be borne in mind that the basic purpose of the Interstate Commerce Act is to do away with every form of discrimination and inequality, and to place all shippers upon equal terms.

New York, N. H. & H. R. Co. v. I. C. C. (1906), 200 U. S. 361 (391);

United States v. Union Stock Yards (1912), 226 U. S. 286 (307, 309).

That essential purpose would be absolutely nullified if these awards should be enforced.

It cannot be argued that *unlawful* discriminations would acquire lawful status simply because of the quasi-judicial mandate of the Commission. The several authorities above cited establish the contrary, and it is further made clear by other controlling decisions. The incongruous results of the enforcement of the order, if unlawful when created voluntarily by the carriers, would be equally so when created anew by giving effect to the Commission's reparation finding. The controlling principle was recently stated by the Supreme Court, in forceful language:

> *Texas and Pac. Ry. Co. v. U. S.* (1933), 289 U. S. 627 (637):
>
> "Obviously, what the carrier may not lawfully do, the Commission may not compel."

The Court cited, among others, the following cases establishing the same principle:

S. P. Co. v. I. C. C., supra;

I. C. C. v. Diffenbaugh (1911), 222 U. S. 42 (46);

Ellis v. I. C. C. (1916), 237 U. S. 434 (445);

U. S. v. Illinois Central R. Co. (1924), 263 U. S. 515 (524);

Anchor Coal Co. v. U. S. (1927), 25 F. (2d) 462 (471-2).

(3) The acceptance of the reparation finding as valid prima facie evidence fails to give any proper effect to the controlling decisions in the Arizona and Wholesale Grocery Cases.

The acceptance of the Commission's finding as *prima facie* evidence, sufficient to support the findings and judgment of the trial Court, fails to give due or indeed any effect to the controlling decisions in the *Arizona* and *Wholesale Grocery Cases.* The Court in the *Arizona Case* in effect held that the 96½-cent rate from California points to Phoenix, prescribed in the *First Phoenix Case* in 1921, became *and continued to be,* until the further legislative order of the Commission, the conclusive measure of a reasonable maximum rate for that transportation service. That period continued until February 25, 1925, the effective date of the order in the *Second Phoenix Case:*

> *Phoenix Chamber of Commerce v. A. T. & S. F. Ry. Co.* (1925), 95 I. C. C. 244.

In giving such conclusive effect to the Commission's legislative action in the *First Case,* the Supreme Court followed the consistent course of its own decisions, including those cited in the opinion (284 U. S., p. 386), and various others, of which the following are typical:

> *Interstate Commerce Commission v. Union Pac. R. Co.,* supra;
>
> *Western Paper Makers' Chemical Co. v. U. S.,* supra;
>
> *A. T. & S. F. Ry. Co. v. U. S.,* supra;
>
> *Virginian R. Co. v. U. S.,* supra.

This Court, in the *Wholesale Grocery Case,* adopted and applied the rule of the *Arizona Case* to rates formally *approved* by the Commission, in effect if not in terms concluding that such rates, by virtue of that approval, are conclusively established as reasonable rates, until thereafter changed *for the future* by the Commission, and meanwhile are not subject to retroactive reduction. Because of the Commission's findings in the *Graham Case,* and this Court's conclusions in the *Wholesale Grocery Case,* the rates to Globe and Safford, in effect in 1923 and thereafter until 1928, became the conclusive measure of reasonable rates for the transportation services from California points to those destinations.

The same principle was followed and applied by the trial Court, in passing upon the reparation claims involving shipments to Clarkdale. It is also clear that the same principle applies to the rates on sugar to Douglas, in effect following 1921, because of their approval in the *Douglas Case.*

The trial Court, by adopting and giving effect to the Commission's reparation finding here in suit, permits its decision to be guided, not by these *conclusive* tests, but by some different measure of the reasonable rates to Tucson. In effect, the trial court has said that although 96½ cents was the *conclusive* measure of a reasonable maximum rate from all points of origin in California *to Phoenix,* in 1923 and 1924, rates of 77 cents, from northern California, and 73 cents, from southern California, to Tucson were the highest possible reasonable rates

for the essentially similar, although substantially longer, hauls to the latter point; that although 86½ cents was the *conclusively* reasonable rate from all California points of origin to Clarkdale, up to 1928, the highest possible lawful rates for similar transportation services, from the same points of origin for the equivalent distances to Tucson, were 77 cents from northern California, and 73 cents from southern California. No question can properly be raised but that the transportation to Tucson was largely over the same rails as to Phoenix, as far as the junction point at Maricopa. This is made clear by the opinion in the *Third Phoenix Case* (R. 11, 12), and defendants' undisputed oral testimony (R. 214-215), and by the Court's own judicial knowledge of the location of these several cities. The trial Court's complete abandonment of the conclusive measures of reasonable rates, afforded by the prescribed or approved rates to Phoenix, and Clarkdale, was in fact and effect simply a failure to give proper, or indeed any weight to the essence of the decision in the *Arizona Case,* later adopted and applied both by this Court in the *Wholesale Grocery Case,* and by the District Court in its own decision in the Clarkdale proceeding.

We ask this Court to conclude that the Commission's reparation finding in the *Third Phoenix Case,* and the reparation orders here in suit, are deprived of any value as *prima facie* evidence; and that the trial Court erred, *as a matter of law,* in according *prima facie* weight thereto in arriving at its findings and conclusions herein, because:

(1) The finding, and the resulting order, were based upon a fundamental misconception and misapprehension of the law; namely, the erroneous proposition that the Commission might lawfully award reparation against rates previously prescribed or approved.

(2) That fundamental error pervades the finding in its entirety; for in that finding the Commission treated *all* the rates, to *all* the points there involved, including those points where its jurisdiction has since been declared to have been erroneously asserted, as being interrelated and interdependent, and endeavored thereby to create a properly related and harmonious rate-structure covering all of those related destinations.

(3) The finding having been determined by controlling Court decisions to have been completely invalid as to certain of the destinations, its enforcement as to other destinations, such as Tucson, will create retroactive discriminations, clearly arbitrary and violative of the spirit and intent of the Act, in excess of the Commission's powers thereunder, and wholly contrary to the obvious purpose of the Commission in the premises.

(4) To accord even *prima facie* effect to the finding, as a determination of reasonable rates to the destinations involved here, is to ignore and cast aside the controlling decisions in the *Arizona* and *Wholesale Grocery Cases,* and the trial Court's own final judgment in the Clarkdale suit.

(b) The showing attempted by plaintiffs, apart from the finding and orders in the Third Phoenix Case, was largely incompetent, and in any event wholly inadequate to support the trial court's findings and judgment.

Plaintiffs' evidence, other than the report in the *Third Phoenix Case* (Exhibit 1), the reparation orders (Exhibits 2 and 3), and the Rule V statements setting forth the shipments (Exhibit 4: R. 125), consisted principally of a tabular statement of rates and distances (Exhibit 5) submitted *by way of rebuttal* through plaintiffs' witness Reif, over defendants' objection (R. 219), and the accompanying oral testimony of that witness (R. 218-224).

Although Exhibit 5 was introduced through Witness Reif, the record shows that it was prepared under the supervision of another person, and not by the witness personally, although it does indicate that he "checked the statement to see that it was correct" (R. 223). Moreover, as above noted, both this exhibit and the accompanying testimony were offered in rebuttal of defendants' showing, and not as a part of the plaintiffs' case in chief. None of this testimony appears to be directed toward the rebuttal or contradiction of any specific portion of defendants' evidence; in fact, the evidence is merely cumulative and not proper rebuttal at all.

The exhibit is simply a reproduction, with certain significant omissions as well as some immaterial additions, of the tabulation of destinations, rates and distances, which appears on page 178 (R. 22) of the opinion in the *Third Phoenix Case.* The significant omissions are of the rates and distances to Phoenix,

as well as all the distances from the northern California group to the several destinations. The additions include principally the rates prescribed in the *Third Case,* both for reparation purposes and for the future. All of these rates are set forth at pages 180 and 181 of the decision itself (R. 25-26). It may properly be said, therefore, that Exhibit 5 is nothing more than a reproduction of portions of the Commission's opinion, already in evidence in plaintiffs' case in chief (R. 123); and if the exhibit has any value as evidence here, it is only because it lends graphic emphasis to our statement that the Commission, by that decision, was endeavoring to work out a carefully adjusted and properly related rate-structure, both past and future, covering all the important Arizona destinations. In this respect, however, it adds nothing which was not readily apparent from the opinion.

Considered apart from the opinion, and as an independent rate-comparison, the exhibit has no evidentiary value at all, because based upon an assumption of fact demonstrated by plaintiffs' own showing to be entirely erroneous. In his cross-examination Witness Reif explained (R. 223) that this comparison was predicated upon the theory that the carriers had contended in the *Third Case* "that 120 per cent of Southwestern rates is the measure of a reasonable rate from California to Arizona". It had already been shown by Witness Fielding (R. 216), in answer to questions by *plaintiffs'* counsel, that the carriers had not made that contention in the *Third Phoenix Case.* Moreover, the report in that case (Plaintiffs' Exhibit 1: R. 21) itself shows that the proposal there made

by defendants was that the rates from California to Arizona should be 121 per cent of the Memphis-Southwestern rates, *provided that the rates to Arizona points were based on the weighted average haul.* The distances shown on Exhibit 5 are not *weighted average* distances at all, but simply average short-line distances from and to groups, being the same as those shown in the report in the *Third Phoenix Case* (R. 21, 22).

The authorities sustain the proposition that Exhibit 5, being largely cumulative, was not properly received as *rebuttal* testimony.

Wigmore on Evidence, 4th ed., Vol. III, Sect. 1873;
Revised Code of Arizona, 1928, Sect. 3807;
24 *Cal. Jur.* 764-765.

Defendants duly objected to the receipt of Exhibit 5 in evidence (R. 219), and also duly moved to strike it from the record (R. 224), as incompetent, because not prepared by the witness, and as not proper rebuttal. The trial Court overruled both the objection and the motion. Defendants submit that these rulings were erroneous.

In any event, it is apparent that Exhibit 5, *of itself,* affords no support for the findings and conclusions adopted by the trial Court. To the extent that the Court relied thereon, it committed material error, for the exhibit is incompetent, for the reasons above recited; or if competent, it is subject to all of the infirmities inherent in the reparation finding in the *Third Case.*

3. **Defendants' evidence demonstrates conclusively that the rates as charged were not unreasonable.**

The defendants' affirmative showing, addressed to the issue of the reasonableness of the rates, consists of rate-comparisons (Exhibit F: R. 202-203), supplemented by the oral testimony (R. 198, 205, 212-217) of Witness J. L. Fielding. Mr. Fielding is an experienced railroad traffic officer, whose qualifications were stipulated (R. 198). Various decisions of the Commission relating to rates on sugar and other commodities to Arizona points were also offered by defendants, and received in evidence (Exhibits A to D, inclusive: R. 128-197).

Exhibit F compares the rates charged, as shown upon the Rule V statements, and the rates which the Commission undertook in the *Third Phoenix Case* to declare reasonable for reparation purposes, with rates from the same points of origin in California to other destinations in Arizona (Phoenix, Globe, Safford, and Douglas) which the Commission prescribed or approved as reasonable in the *First Phoenix Case* (Defendants' Exhibit B: R. 138-149), the *Graham Case* (Defendants' Exhibit D: R. 175-197), and the *Douglas Case* (Defendants' Exhibit C: R. 150-174).

These rate-comparisons are directly pertinent, and indeed afford the best possible tests by which to determine the reasonableness of the rates charged. Both the Commission and the Courts have held that a prime test of the reasonableness of a rate is to compare it with rates approved or prescribed by the Commission for application upon the same com-

modity, for similar hauls between related points, in the same territory.

Blackman, et al. v. A. C. & Y. R. Co., et al. (1918), 49 I. C. C. 649 (654):

"One of the best tests of the reasonableness of rates under Section 1 is to compare the rates at issue with rates prescribed by this Commission or with rates established by the carriers with relation thereto."

Montgomery v. A. & S. Ry. Co., et al. (1928), 147 I. C. C. 415 (418):

"While comparisons with ratings established by the carriers are always of probative value in cases of this kind, the best comparisons are with ratings which have been prescribed by us."

Other decisions of the Commission to the same effect include:

Federated Metals Corp. v. Central R. R. Co. (1927), 126 I. C. C. 703 (709);

Illinois Electric Co. v. C. B. & Q. R. Co. (1928), 140 I. C. C. 63 (65).

In

Western Paper Makers' Chemical Co. v. U. S., supra,

the Supreme Court said (271 U. S., p. 271):

"Prior existing rates, whether locals or such proportionate rates from a key point to points of destination as were made applicable to this particular class of traffic, or direct rates upon other commodities moving from similar points of origin, are proper matters for consideration in establishing new through rates."

In

Montrose Oil Refining Co. v. St. L. & S. F. Ry. Co. (1927), 25 F. (2d) 750,

the Court said (752-753):

> "By comparing the charges for similar service and under similar conditions with the rates demanded and collected from the plaintiff, the Commission found the latter to be violative of the act in the respects complained of to the extent they exceeded 15.5 cents, and substantially, that the damage to the plaintiff resulted in the failure of the defendants to establish through routes and just and reasonable charges as provided in the act. Comparison of existing charges made under similar conditions has been recognized as a proper basis for fixing reasonable new rates. *Western Paper, etc., Co. v. United States,* 271 U. S. 268, 46 S. Ct. 500, 70 L. Ed. 941. It is inconceivable that this method may not be employed in determining whether a particular rate is reasonable or not, especially where, as here, none of the rates are attacked as being confiscatory * * *."

The obvious reason for the acceptance of Commission-made rates as the best possible standard of comparison, by which to judge other rates, is, of course, that a pronouncement by the Commission, approving or prescribing a particular rate as reasonable for future application to a particular service, constitutes that rate the *conclusive* measure of a rate or charge fulfilling the requirements of the Act. That principle is established by the controlling decisions of the Supreme Court, and particularly finds full recognition

in the *Arizona Case*. In the instant case, these comparisons with Commission-made and therefore conclusively reasonable rates to directly related points in the same destination territory, constitute a showing ample to overcome the mere *prima facie* case made by plaintiffs, even if it be assumed that the finding relied upon is *jurisdictionally* valid. The reparation finding in the *Third Phoenix Case*, even if assumed to have been jurisdictionally made so far as it deals with the rates to Tucson, creates a mere *prima facie* presumption, sufficient to enable plaintiffs to prevail only if no stronger opposing evidence is offered.

B. & O. Ry. Co. v. Brady, supra (288 U. S., p. 458);

Atlantic Coast Line R. Co. v. Smith Bros., supra (63 F. (2d), p. 748);

Blair v. C. C. C. & St. L. Ry. Co., supra (45 F. (2d), p. 793);

Southern Ry. Co. v. Eichler, supra (56 F. (2d), p. 1018).

On the other hand, opposed to that *prima facie* presumption (if in this case it exists), defendants present these comparisons with rates which have been prescribed or approved to these other directly related points, and therefore are *conclusively* presumed to have been just and reasonable. The reparation finding and orders upon which plaintiffs depend, considered as evidence, are inconsistent with the findings and orders in which the compared rates were approved or prescribed. The former have merely *prima facie* effect; but the latter are *conclusive*. Under established rules of evidence, the latter must prevail,

and the presumption created in plaintiffs' favor, even assuming the reparation finding to have been jurisdictionally made, is completely rebutted and overthrown.

The most forceful and direct comparison appearing on Exhibit F is between the rates as charged on plaintiffs' shipments, and the rate to Phoenix, prescribed in the *First Phoenix Case.* The order in that case was effective until February 25, 1925, and thus for a substantial portion of the reparation period in the instant case. In fact, 21 out of the 41 shipments upon which reparation is sought originated prior to February 25, 1925 (R. 37, 49-50), and all but three of the remaining 20 moving during 1925, but after February. Under the decision in the *Arizona Case,* the 96½-cent rate was *conclusively* established during the period prior to February 25, 1925, as the reasonable maximum rate to Phoenix, for hauls from 80 to 100 miles less, on the average, than the hauls to Tucson. The rates charged on plaintiffs' shipments were *less* than the reasonable maximum rate prescribed for the shorter hauls to Phoenix. The rates actually maintained at Tucson, after September 17, 1921, and until February 25, 1925, were the same as at Phoenix (R. 14-15). The rate-basis prescribed for reparation purposes was, however, *higher* at Tucson. It is plain that the same standards of reasonableness should be used in determining the rates to both points; and since 96½ cents was the conclusively reasonable rate to Phoenix, the much lower rates charged on the Tucson shipments were also conclusively reasonable.

Defendants proposed appropriate findings of fact, conforming to their showing (Proposed Findings Nos. 13, 14, 15, and 16: R. 242-247). These findings were rejected by the trial Court (R. 247), and were thereupon made the subject of exceptions, and appropriate assignments of error (Assignments Nos. 14, 15, 16, and 17). We ask this Court to sustain these assignments, and to conclude that the trial Court, in failing to adopt the proposed findings, or other findings conforming to the *conclusive* proof made by defendants, has committed material error requiring the reversal of the judgments.

CONCLUSION.

The judgments from which the instant appeals have been taken should be reversed, because of three fundamental errors committed by the trial Court:

First, its erroneous recognition of the *Eagle Case* as the controlling authority upon the question of the Commission's jurisdiction to make the finding and orders upon which the suits are based; and its failure to recognize that that case was disapproved in principle, and in effect overruled, by the Supreme Court in the *Arizona Case,* and that the *Arizona Case* and the *Wholesale Grocery Case* are the controlling authorities upon the jurisdictional issue;

Second, its error in according *prima facie* evidentiary value to the reparation finding and orders in suit; and its failure to recognize that the finding and

orders are based upon the *same* misconceptions of law, by the Commission, which invalidated the *same* finding, and the orders based thereon, when reviewed in the *Arizona* and *Wholesale Grocery Cases,* and that the Commission's error of law pervades the entire finding, and renders it of no evidentiary value in these suits; and

Third, its error in failing to recognize the decisions in the *Arizona Case* and the *Wholesale Grocery Case* as having conclusively determined the lawful measure of the reasonable rates to be charged, not only to the destinations involved in those cases, but also to the adjacent and related destination involved in the instant cases.

We ask this Court to conclude that the trial Court erred *as a matter of law* in concluding, upon the undisputed facts, that the Commission had valid jurisdiction to make the reparation awards here in suit; and to conclude further that, even if the Commission possessed such jurisdiction, *in the abstract,* the finding and orders here in suit, being predicated upon a demonstrated error of law by the Commission, afford no satisfactory evidence upon which to base the trial Court's finding and conclusion that the rates under attack were unreasonable or otherwise unlawful, and that the trial Court therefore erred in adopting findings and conclusions unsupported by satisfactory evidence, and in fact opposed to the conclusive showing presented by defendants.

The judgments should be reversed, and the causes remanded with instructions to enter judgments for defendants.

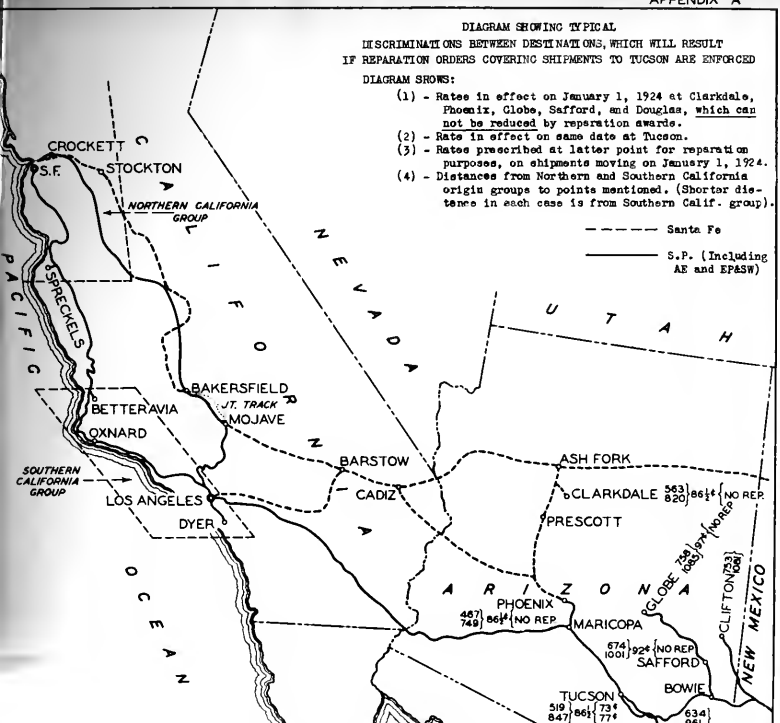
Respectfully submitted,

ALEXANDER B. BAKER,
LOUIS B. WHITNEY,
JAMES E. LYONS,
BURTON MASON,
Attorneys for Defendants and Appellants.

Dated, San Francisco, California,
September 25, 1934.

(Appendix Follows.)

Appendix.



NOTE: - Railroad lines shown are those in existance January 1, 1924.

Distances to Tucson and other points in Southeastern Arizona, from Northern California, are computed via Mojave, Barstow, Cadiz, Phoenix, and Maricopa, thence S.P. and connections to destination, as in the report of the Third Phoenix Case. That route was not open under the tariffs. Distances via actually used routes were substantially greater.

(a) - In Docket 11532, 62 ICC 412, the Commission prescribed a rate of 96-1/2¢ for the future, from all California points to Phoenix. The 86-1/2¢ rate shown represents this 96-1/2¢ rate, as reduced 10%, July 1, 1922. In the Arizona Grocery Case, 284 US 370, the Supreme Court held that no reparation could be awarded against rates maintained in compliance with the order in Docket 11532.

(b) - In Docket 13139, 81 ICC 134, the Commission found not unreasonable the current rates on sugar from all California points to Globe, Safford, and other Globe Branch points. The rates shown at those two points represent voluntary reductions below the basis approved. In the Wholesale Grocery Case, 68 F. (2) 601, the Circuit Court of Appeals held that no reparation could be awarded against rates equal to or less than those thus approved.

(c) - In Docket 14011, 88 ICC 5, the Commission found not unreasonable the current rate on sugar from all California points to Clarkdale. The 86-1/2¢ rate shown is the rate thus approved. In Miller Co. vs A.T.& S.F. Ry. Co., No. L-824 Phx, the U.S.District Court for Arizona held that no reparation could be awarded against the rate thus approved.

(d) - In Docket 11442, 64 ICC 405, the Commission found not unreasonable the current (1921) rate on sugar from all California points to Douglas. The 86-1/2¢ rate shown represents the approved rate, as reduced 10%, July 1, 1922. Under the rule of the Wholesale Grocery Case, no reparation can be awarded against rates lower than the rate thus approved.

No. 7343

IN THE

United States Circuit Court of Appeals

For The NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY,
Defendant and Appellant,

vs.

F. J. BAFFERT and A. S. LEON, co-partners, trading under the firm name of Baffert & Leon,
Plaintiffs and Appellees.

SOUTHERN PACIFIC COMPANY, et al.,
Defendants and Appellants,

vs.

WHEELER-PERRY COMPANY,
Plaintiff and Appellee.

FILED
NOV 2 - 1934
PAUL P. O'BRIEN,

BRIEF FOR APPELLEES.

FRED J. ELLIOTT,
FRANK L. SNELL, JR.,
Attorneys for Plaintiffs and Appellees.

THE MANUFACTURING STATIONERS INC. PHOENIX, ARIZONA

SUBJECT INDEX

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No. 7343

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BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

The appellee will adopt in this brief the plan of the appellants, of designating the parties in the same manner as in the Trial Court.

In most respects the Statement of the Case appearing

in the brief of the defendants (pp. 1-11) is correct. There are, however, certain omissions and errors therein which should be called to the court's attention. They are briefly as follows:

The defendants refer to the decision of the Interstate Commerce Commission in,

> *Traffic Bureau, et al. v. A. T. & S. F. Ry. Co., et al.*, (1928), 140 I. C. C., 171 (R. 8-36),

as the "Third Phoenix Case". This was proper in the *Arizona Grocery Case* (49 Fed. (2) 563· affirmed 284 U. S. 370), where we were dealing with Phoenix rates. The reference is not appropriate here, however; we are now dealing with shipments to Tucson. This decision deals with rates to many destinations in Arizona (R. 8-36); and rates to Phoenix in no manner were singled out or was Phoenix dealt with as the principal or key point in arriving at what were reasonable rates, either for purposes of reparation or for the future. In other words, the decision deals with rates to Tucson and other points as much as to Phoenix. It would be more accurate and appropriate in the instant case to refer to it as the "Tucson Case".

We shall therefore, so as to avoid misleading the court as to the true effect of this decision, refer to it as the "Tucson Case".

On page 5 of their brief defendants refer to the Commission's decision in *Docket 6806, Arizona Corporation Commission v. A. T. & S. F. Ry. Co., et al, 34 I. C. C. 158.* Because of the importance which will attach to the date of this decision, we wish at this time to call the court's

attention to the fact that it was decided May 25, 1915, (R. 128). The order in this case was also issued May 25, 1915, (R. 136). It became effective August 15, 1915, (R. 136-137), and specifically provided that it would "continue in force for a period of not less than two years from the date" when it took effect, i. e. until August 15, 1917. (R.137).

Finally the defendants attempt at page 10 to set forth plaintiffs' position in the trial court. Some omissions are made in this regard, and we shall therefore set them forth in full. Plaintiffs contended:

1. That the Commission in *Docket 6806* did not prescribe for the future the reasonable rates on sugar to Tucson; but

2. That even if the Commission had in this decision prescribed or approved the rates to Tucson, the effectiveness of that decision had been destroyed long before the decision of the Commission in the *Tucson Case* (140 I. C. C. 171), for two reasons: (a) the force and effect of *Docket 6806* and the order therein made expired August 15, 1917, two years after it became effective; and (b) because the subsequent changes in the rates destroyed the force and effect of the Commission's earlier approval. Thus the rates charged the plaintiffs were subject to reparation awards;

3. That the Commission's findings and awards with respect to reparation in the instant cases were jurisdictionally made and therefore valid;

4. That the findings and orders of the Commission in

the *Tucson Case* constitute *prima facie* evidence of the unreasonableness of the rates charged, and of the fact and amounts of the damage alleged to have been incurred by plaintiffs, and of the other facts and findings therein set forth;

5. That this *prima facie* showing was further supported by other testimony introduced by plaintiffs;

6. That the defendants failed to overcome the *prima facie* case of plaintiffs; and

7. That plaintiffs were entitled to judgments in accordance with the prayers of their complaints.

Otherwise than as above set forth the statement of the case submitted by defendants is correct.

BRIEF OF ARGUMENT.

I.

THE AWARDS OF THE COMMISSION UPON WHICH THE PRESENT CASES ARE BASED ARE VALID, AND THE COMMISSION POSSESSED JURISDICTION TO MAKE THE SAME.

1. The effectiveness of Docket 6806, decided by the Commission in 1915, and the Order therein made, expired in 1917.

The effectiveness of the decision in *Docket 6806* expired in 1917, under the provisions of the Commerce Act then in force.

> *Act to Regulate Commerce,* Sec. 15 (1 and 2); 34 Stat. L. 584; 41 Stat. L. 484, prior to amendment of February 28, 1920.

The Commission's order in *Docket 6806,* by referring

to the report and findings, made them a part of the order itself.

Arizona Wholesale Gro. Co. v. S. P. Co., 68 Fed. (2), 601.

The Commission can only act legislatively by formal order.

C. B. & Q. R. R. Co. v. Merriam and Millard Co., 297 Fed. 1;
American Sugar Rfg. Co. v. Del. L. & W. R. Co., 207 Fed. 733;
Brady v. I. C. C., 43 Fed. (2), 847, aff. 283 U. S. 804; 49 U. S. C. A., Sec. 15 (1).

It is the Commission's orders, not its reports and findings, which establish rates for the future; and it is the order, not the findings, which makes such rates conclusively just and reasonable, and free from reparation awards.

U. S. v. Atl., B. & C. R. Co., 282 U. S. 522; 75 L. ed. 513;
A. T. & S. F. Ry. Co. v. Arizona Gro. Co., 49 Fed. (2), 563; affd:
Arizona Gro. Co. v. A. T. & S. F. Ry. Co., 284 U. S. 370;
Eagle Cotton Oil Co. v. So. Ry. Co., 51 Fed. (2) 443.

Cases cited by defendants do not sustain their position, but on the contrary these cases all point out that the Commission can only act and give effect to its findings through orders.

Am. Sugar Ref. Co. v. D. L. & W. R. Co., 207 Fed. 733;
C. B. & Q. R. Co. v. Merriam, 297 Fed. 1;

U. S. v. A. B. & C. R. Co., 282 U. S. 522;
Western Paper Makers' Chem. Co. v. United States, 271 U. S. 268;
Vir. R. Co. v. United States, 272 U. S. 658;
S. P. Term Co. v. I. C. C., 219 U. S. 498;
Brady v. I. C. C., 43 Fed. (2) 847; affd: 283 U. S. 804.

2. Changes made subsequently in the rates found not unreasonable in Docket 6806 destroyed any Commission-made (or approved) character which such rates theretofore might have possessed.

The first increase of 25% in the rates found not unreasonable in *Docket 6806* was made by order of the Director General.

History of Rates, see Record, p. 200.

The Director General's order was not equivalent to an order of the Commission. In fact such order was carrier-made in character and subject to examination and change by the Commission.

Sec. 10, *Federal Control Act*, 40 Stat., 456;
No. Pac. Ry. Co. v. No. Dak., 250 U. S. 135;
Mo. Pac. R. Co. v. Ault, 256 U. S. 554.

The Director General's order No. 28 should be treated as if it was action taken by a carrier subject to the Act. This being true, the rate thereafter became carrier-made, and subject to reparation.

Dir. Gen. v. Viscose, 254 U. S. 498;
A. T. & S. F. Ry. Co. v. Arizona Gro. Co., 49 Fed. (2), 563.

3. Summary of Part I of Argument.

The Commission has jurisdiction as the administrative tribunal created by the Commerce Act to find that rates which have been charged by railroads for the interstate transportation of property in the past have been unreasonable or otherwise unlawful, and to make awards of reparations to shippers for the exaction of charges on their past shipments under such unlawful rates.

Sec. 8, Sec. 9; Sec. 13 (1), and Sec. 16 (1), 49 U. S. C. A.

T. P. Ry. Co., v. Abilene Cotton Oil Co., 204 U. S. 426; 51 L. ed. 553;

L. & N. R. Co. v. Sloss Sheffield Iron Co., 269 U. S. 217; 70 L. ed. 242;

Mills v. Lehigh Valley R. R. Co., 283 U. S. 473; 59 L. ed. 1415;

Meeker v. Lehigh Valley R. R. Co., 236 U. S. 412; 59 L. ed. 645.

The rates charged on shipments involved in the instant cases were not rates which had been fixed or approved by the Commission as just and reasonable. Being carrier-made, the Commission's awards of reparations are valid and should be enforced.

Arizona Gro. Co. v. A. T. & S. F. Ry. Co., 284 U. S. 370, 390.

II.

THE TRIAL COURT IN THE INSTANT CASES FOUND THE RATES CHARGED PLAINTIFFS WERE UNREASONABLE AND THAT PLAINTIFFS ARE ENTITLED TO RECOVER REPARATIONS FROM THE DEFENDANTS. THIS DECISION OF THE TRIAL COURT SHOULD BE APPROVED.

1. **The Commission's determination of the unreasonableness of the rates charged was conclusive on the Trial Court.**

When the Commission in *Docket 16742*, determined that the rates charged plaintiffs were unreasonable, this became conclusive on the Trial Court in the present cases.

So. Car. Asparagus Growers Assn. v. So. Ry. Co., 64 Fed. (2) 419.
Glenn Falls Portland Cem. Co. v. D. & H. Co., 66 Fed. (2) 490.

Any other rule would destroy the principle of uniformity of rates required under the Act.

Mitchell Coal & Coke Co. v. P. R. Co. 230 U. S. 247;
Baltimore & O. R. Co. v. Brady, 288 U. S. 448.

The proof on the questions of the fact, and amount of damage to plaintiffs, was clear, convincing and undisputed.

Record, 124-125, and 37, 41, 49, 50 and 53.

2. **Whether a rate is reasonable or unreasonable is a question of fact. The report and findings in Traffic Bureau, et al, v. A. T. & S. F. Ry. Co., 140 I. C. C. 171, and the awards of reparation made in favor of the Plaintiffs constituted a prima facie case before the Trial Court, which the defendants failed to overcome. The decisions of the Trial Court being supported by substantial evidence, are therefore conclusive on appeal as to this question of fact.**

Whether a rate is reasonable or unreasonable is a question of fact, not one of law.

Ill. Cent. R. R. Co. v. I. C. C. 206 U. S. 441;
T. P. R. Co. v. I. C. C. 162 U. S. 197;
Cin. N. O. & T. R. Co. v. I. C. C., 162 U. S. 184.

Where actions are tried by the court without a jury, the judgments of the Trial Court, if supported by substantial evidence, are conclusive on appeal; and the evidence must be considered in a light most favorable to appellees.

United States v. Linde, 71 Fed. (2), 925;
Victor Talking Machine Co. v. George, 69 Fed. (2), 871.
Mandel Bros. v. Henry A. O'Neil, Inc. 69 Fed. (2), 452;
Aberly v. Craven Co., 70 Fed. (2), 52;
Bayless v. Gage, 69 Fed. (2), 269;
Kurecki v. Buck, 71 Fed. (2), 227.

The evidence introduced in support of plaintiff's complaints is substantial, and ample to support Trial Court's findings and conclusions.

Traffic Bureau v. A. T. & S. F. Ry. Co., 140 I. C. C. 171.

Record, pp. 123, 124, 125, 214, 218, 220, 223.

Report, findings and awards, in *Docket 6806* were "prima facie evidence of the facts therein stated."

49 U. S. C. A., Sec. 16 (2).

Partial invalidity of *Docket 16742* as to Phoenix, Clarkdale, and Globe, did not destroy its validity to other points under consideration.

Spiller v. A. T. & S. F. Ry. Co., 253 U. S. 117, 132.

Comparison of rates to Phoenix or other points was not conclusive upon Trial Court in determining unreasonableness of rates on shipments in question.

Advances in Rates, Western Case, 20 I. C. C., 307, 309.
I. C. C. v. Chicago Gr. R. Co., 141 Fed. 1003, 1008. Aff: 209 U. S. 108;
City Coal Co. v. New York, 123 I. C. C. 609;
Dallas Paper Co. v. T. & N. R. Co., 132 I. C. C. 59;
Peabody Lbr. Co. v. Penn. R. Co., 132 I. C. C. 741;
Railway Exp. Agency v. United States, 6 Fed Supp. 249;
Traffic Bureau v. A. T. & S. F. Ry. Co., 140 I. C. C. 171.

The defendants having failed to introduce the evidence presented to the Commission in *Docket 16742*, such findings are conclusive and cannot be assailed upon appeal.

Miss. Val. Barge Co. v. United States, decided April 30, 1934, 290 U. S. .....

As previously stated, the only question with which this court can be concerned is whether there was any substantial evidence to support the findings of the trial court.

Kurecki v. Buck, 71 Fed. (2), 227, 229;
United States v. Alger (C. C. A. 9th), 68 Fed. (2), 592, 593;
So. Ry. Co. v. Blue Ridge Power Co., 30 Fed. (2), 33, 40;
United States v. Dudley, 64 Fed. (2), 743.

3. The question of discrimination is not properly before this court, and in any event is not an issue that can be raised by defendants.

The defendants having failed to assign as error the matter of discrimination, it is not before this court for review.

Louie Share Gan v. White, 258 Fed. 798;
Wight, et al, v. Washoe Co., 251 Fed. 819.

Behn Meyer Co. v. Campbell, et al, 205 U. S., 403.

The question of prejudice and discrimination is not one that can be raised or complained of by defendant carriers.

I. C. C. v. Chicago, R. I. & P. Ry. Co., et al, 218 U. S., 88, 109.

4. No error occurred in the introduction of evidence before the Trial Court.

The Trial Court has wide discretion in the matter of the order of introduction of evidence, and in the absence of manifest abuse of this discretion, its ruling will not be disturbed.

Sec. 3808, Rev. Stat. Arizona, 1928.
De Mund v. Benson, 265 Pac. 84 (Arizona).
24 Cal. Jur. 764.

The fact that some evidence conflicts with other evidence does not make it incompetent. The weight and credibility of witness is a question to be passed upon by the Trial Court.

Cyc. on Fed. Procedure, vol. 2, 709.

In any event, erroneous admission of evidence in cases tried by a court sitting without a jury is not grounds for reversal, especially where there is sufficient competent evidence to sustain its findings.

South Fork Brewing Co. v. United States, 1 Fed. (2), 167; cert den. 266 U. S. 626.
Cascaden v. Bell, 257 Fed., 926;
Lackner v. McKechney, 2 Fed. (2), 516;
Hall v. United States, 267 Fed., 795;
Gardner v. United States, 71 Fed. (2), 63 (9th C. C. A.).

There was sufficient evidence before the *Trial Court* to sustain its findings and decisions.

Docket 16742, Record 123, 124.
Awards of Reparation, Record 40-41 and 52-53.

III.

CONCLUSION.

ARGUMENT.

FOREWORD.

Although defendants assert several Assignments of Error (Defendants' Brief, pp. 11-14), and their brief in support thereof deals with many contentions and alleged errors of the trial court, nevertheless the entire argument of defendants can be summarized under two major headings:

First, that the rates charged plaintiffs on their shipments upon which reparation was allowed, were conclusively just and reasonable by reason of a decision of the Interstate Commerce Commission, decided May 25, 1915, appearing in *34 I. C. C. 158,* and known as *Docket 6806,* and therefore the reparation awards to plaintiffs are unlawful by reason of the *Arizona Grocery Case,* (284 U. S. 370), and the *Arizona Wholesale Case,* (68 Fed. (2), 601); and

Second, that if the Commission had authority to award reparation upon the shipments in question, the trial court erred in not rendering judgment for the defendants upon the evidence introduced at the trial of these cases.

This is summarized more or less in the same manner

by the defendants in their brief, in the foreword beginning at page 26, and in the conclusion to their argument beginning on page 97.

All of the points discussed by defendants fall under one or the other of these two main heads. While plaintiffs in this brief have not attempted to deal separately with each of the many subtopics of defendants' brief, all of the matters essential to the determination of these cases by the court are considered herein. We are certain the court will be convinced that no prejudicial error occurred at the trial of these cases, that the appeals should be dismissed, the findings of fact and conclusion of law of the District Court approved, and the judgments rendered thereon affirmed.

I.

THE AWARDS OF THE COMMISSION UPON WHICH THE PRESENT CASES ARE BASED ARE VALID, AND THE COMMISSION POSSESSED JURISDICTION TO MAKE THE SAME.

1. The effectiveness of Docket 6806, decided by the Commission in 1915, and the order therein made, expired in 1917.

Defendants labor hard from pages 29 to 36 inclusive of their brief, in order to show that the Commission *by its decision* in Docket 6806 (decided in May, 1915), approved the rates on sugar to Tucson, the destination here involved. For reasons elsewhere set forth in our brief, the effectiveness of this decision expired in 1917, and it is therefore immaterial whether the Commission in its decision approved such rates or not. In fact we shall later show that the more the Commission effectively passed

on them for future application (i. e. acted on such rates legislatively) the more effectively they expired in 1917, as Commission approved or prescribed rates. We shall, for this reason, not spend any time on this point.

There is one vital reason why *Docket 6806,* and the Order made therein, are not controlling in the present cases. Whatever force and effect they had upon the rates to Tucson expired in 1917; that is, two years after the order was made.

For the convenience of the court we set forth herewith the pertinent portions of the *Commerce Act* which were in effect at the time *Docket 6806* was decided and the order therein made:

> "Whenever, after full hearing of a complaint . . . the Commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this Act for the transportation of persons or property . . are unjust or unreasonably or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged . . , *and to make an order* that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation . . in excess of the maximum rate or charge

so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

"All orders of the Commission, except orders for the payment of money shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, *not exceeding two years,* as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission or be suspended or set aside by a court of competent jurisdiction." (Emphasis supplied)

Act to Regulate Commerce, Sec. 15 (1 and 2); 34 Stat. L. 584; 41 Stat. L. 484; prior to Amendment of February 28, 1920.

The amendment of 1920 removed the two-year limitation, and provided that all orders of the Commission should "continue in force until its further order, or for a specified time, according as shall be prescribed in the order", *49 U. S. C. A., 15 (2).* The decision of the Commission which fixed 96½c as the maximum rate to Phoenix, and which was involved in the *Arizona Grocery Case,* was decided *June 22, 1921,* (R. 138), more than a year after the amendment removing the two-year limitation had been passed.

It is therefore clear that *Docket 6806* and the *First Phoenix Case* are not analagous. The effectiveness of each must be considered in the light of the Act in force at the time each decision was rendered. This should be borne in mind throughout the entire argument which follows.

Defendants state that they do not rely upon the order in *Docket 6806;* that their defense is based upon the findings in that case.

In passing, and before showing that the cases of *Arizona Gro. Co. v. A. T. & S. F. Co., 284 U. S. 370,* hereinafter referred to as "Arizona Grocery Case", and *Arizona Wholesale Gro. Co. v. S. P. Co., 68 Fed. (2) 601,* hereinafter referred to as "Wholesale Grocery Case", make this position entirely untenable, let us examine the statement of the defendants:

> "It should be noted that defendants do not rely at all upon the *order* made in Docket 6806. Their defense is based upon the express *finding* there made by the Commission, particularly as that finding was addressed to the rate made effective, during the pendency of the case, to Tucson. The Commission's *order* in Docket 6806 (R. 136-137) related entirely to rates *for the future* to *Phoenix* and *Prescott,* neither of which points is involved as the destination of any of plaintiffs' shipments. While the order refers to and by such reference includes the opinion, the context makes it clear that this reference was merely for the purpose of affording proper support, through an express finding of fact, for the affirmative order respecting the future rates to Phoenix and Prescott. No affirmative *order* was made, dealing with the rates to Tucson; and the *finding* contained in the opinion, relating to the rates to that point, was therefore not an essential part of the order."
>
> (Appellant's brief, p. 48).

The order in Docket 6806 in this regard is identical with the order in the case of *Graham and Gila County*

Traffic Assn. v. Arizona Eastern R. Co., et al, 40 I. C. C. 573, considered by this court in the Wholesale Grocery Case (R. 136 and 137). There also, no *affirmative order* was made dealing with the reasonableness of sugar rates to Globe. In the Wholesale Grocery Case the shipper contended that no order had been made, no legislative action taken, on the question of sugar rates to Globe. The court, however, on this question said:

> "The appellant argues earnestly that the *order* in the Graham Case is silent as to the reasonableness of the rates to Globe, and that therefore the commission cannot be understood to have taken any 'legislative action on the question of reasonableness of rates for the future'. Two short answers may be made to this contention. First, the order in the Graham Case specifically, as we have seen, makes the report a part thereof; and in the report the question of unreasonableness is treated. Second, the Supreme Court, in the Arizona Grocery Case, has *recognized essential unity of a report and an order promulgated by the commission.*" (Emphasis supplied).
>
> 68 Fed. (2), 601, 609.

It is therefore apparent that the Wholesale Grocery Case established the principle that the Commission by such reference makes the report part of the order. It would seem to follow that when the order becomes inoperative, so likewise would the findings which have been made a part of it become inoperative.

The cases uniformly hold that the Interstate Commerce Commission can only act legislatively by formal order.

Chicago, B. & Q. R. R. Co. v. Merrian & Millard Co., 297 Fed. 1.

In this case the Court, on page 4, said:

> "Section 15 of the Interstate Commerce Act (Comp. St. Par. 8583) required that any change of the rates made by the Commission should be made, not by a report, finding, or opinion, but by an order to the carrier to cease and desist from collection of the rate, to take effect not less than thirty days after the date of the order."

Also,

American Sugar Rfg. Co. v. Delaware L. & W. R. Co., 207 Fed. 733; and
Brady v. I. C. C., 43 Fed. (2), 847, aff. 283 U. S. 804.

Both of the last cases are cited in Defendant's brief, p. 51.

See also the Act itself, Section 15 (1).

This is again made clear by a case cited by defendants on page 49 of their brief.

U. S. v. Atl. B. & C. R. Co., 282 U. S. 522, 75 L. ed. 513-518.

In this case the court said:

> "The action here complained of is not in form an order. It is part of a report—an opinion as distinguished from a mandate . . Such action is directory as distinguished from mandatory. No case has been found in which matter embodied in a report and not followed by a formal order has been held to be subject to judicial review."

It is utterly absurd for the defendants to insist that the Arizona Grocery Case sustains their contention in this regard, or that it in any degree overrides the *Eagle Cotton Case* (51 F. (2) 443). We appreciate that this court is entirely familiar with the decisions of this court and the Supreme Court in the *Arizona Grocery Case*, but at the expense of repetition we shall consider fully these decisions. In doing so we believe the court will have no difficulty in quickly disposing of the absurd position of defendants.

First let us look at the decision of this court. Judge Wilbur in rendering this decision, and in finding the rates of the carriers to be commission-made, dealt only with the "order" in the First Phoenix Case. This is clear from the following excerpts from that opinion:

> " . . fixed in its previous *order* as a just and reasonable rate",
>
> " . . . its *order* fixing a maximum rates was in legal effect a determination by the Commission in its administrative or quasi-legislative capacity",
>
> " . . . that the *order* of the Commission amounted to a decision that the rates fixed by the carriers below the maximum it had established were just and reasonable",
>
> "Otherwise, it would be absurd to provide that the carrier should thereafter be compelled to conform to the *order* of the Commission";
>
> "It is true that the original *order* is not res judicata, but its effect is quite as final, it is a legislative fiat;"
>
> "For where the rate is one *fixed* by law it is not excessive in any legal sense;"

" . . . rates *established by the legislative power,*"

and other similar references too numerous to mention.

This entire line of reasoning was followed by Justice Roberts in his opinion written in the Supreme Court. He considered at length the legislative history of the function of rate making by the Interstate Commerce Commission, pointing out that originally,

> "No authority was granted *to prescribe* rates to be charged in the future. Indeed after a *finding* that an existing rate was unreasonable the carrier might put into effect a new and slightly different rate and compel the shipper to resort to a new proceeding to have this declared unreasonable."
>
> 284 U. S. 370, at page 385.

That is, there could be no commission-made rate originally because no order pertaining to the future could be issued by the Commission. Continuing,

> "Under the Act of 1887, the Commission was without power either to *prescribe* a given rate thereafter to be charged, or to set a maximum rate for the future, for the reason that so to do *would be to exercise a legislative function not delegated to that body by the statute.*"
>
> "The Hepburn Act and the Transportation Act evince an enlarged and different policy on the part of Congress. The first granted the Commission power to fix the maximum reasonable rate; the second extended its authority to the prescription of a named rate, or the maximum or minimum, or maximum and minimum rate . . When under this mandate the Commission *declares* a specific rate to be reasonable and

lawful rate for the future *it speaks as the legislature*, and its pronouncement has the force of a statute." (Emphasis supplied).

284 U. S., at page 386.

It was by these two Acts, referred to by Justice Roberts, that the Commission was granted the power and authority to issue *orders* pertaining to the future. Without the power to issue an order the Commission's findings and reports had no effect for the future, and could not be considered legislative in character. It is therefore clear that the Commission can only act in its quasi-legislative capacity through an order. The *Arizona Grocery Case* and the *Wholesale Grocery Case* dealt only with the legislative power of the Commission in fixing rates. They were not concerned with the statutory requirement compelling the Commission to make reports and findings before making the order.

Looking again at Justice Robert's opinion, this is apparent:

> "The report, and order of 1921 involved in the present case declared in terms that 96.5 cents was, and for the future would be, a reasonable rate. *The legal rate thus established became by virtue of the Commission's order also a lawful, that is, a reasonable, rate.*" (Emphasis supplied). (Page 387).

It is "*by virtue of the Commission's order*", not by virtue of the report or findings, that a rate prescribed by the Commission becomes lawful. In other words, in the present cases, after the effectiveness of the order in Docket 6806 expired in 1917, (i. e. in two years) by virtue of the

Commerce Act then in effect, the rate or rates so prescribed or approved, either directly or by reference to the report, ceased to be any longer conclusively just and reasonable rates, and they were thereafter subject to reparation orders of the Commission.

The question here being discussed, it seems to us, is absolutely and finally decided by the following and concluding excerpts from Justice Robert's opinion:

> "The Commission's error arose from a failure to recognize that *when it prescribed* a maximum reasonable rate for the future it was performing a legislative function, and that when it was sitting to award reparation it was sitting for a purpose judicial in its nature. In the second capacity, while not bound by the rule of *res judicata,* it was bound to recognize the validity of the rule of conduct prescribed by it and not to repeal its own enactment with retroactive effect. *It could repeal the order as it affected future action,* and substitute a new rule of conduct as often as occasion might require, but this was obviously the limit of its power, as of that of the legislature itself."
>
> (Emphasis supplied). (Page 389.)

The plaintiff is at a loss to see how the defendant carriers get any solace whatsoever out of the *Arizona Grocery Company Case* on this phase of their argument. There is nothing in either the Circuit or the Supreme Court decisions substantiating their position; but quite the contrary, these decisions support the plaintiffs in their contentions that it is the order, not the findings, which make a rate conclusively just and reasonable, and free from subsequent reparation awards.

We submit that *Section 15 (1)* of the Act as it read prior to 1920, the *Eagle Case, (Eagle Cotton Oil Co. v. A. G. S. R. Co., 51 Fed. (2) 443, the Wholesale Grocery Case,* the *Arizona Grocery Case,* dispose entirely, completely and effectively of the argument of the defendant carriers that the Commission was without jurisdiction to make the awards upon which the instant suits are based.

The rates charged the plaintiffs were a part of (as Justice Roberts described them) "the great mass of rates" which are carrier-made rates, and "as to which the Commission may award reparation". The carriers have not had the temerity to suggest in these cases that they were bound under pain of penalty to comply with the report and order of the Commission in Docket 6806 after the expiration of the two years provided in the statutes. Not being longer bound by the report and order, and being free to fix their own rates on plaintiff's shipments, such rates became and remained carrier-made, not commission-made. The carriers would have the shippers bound by the findings although they *were not.* Their commission-made character expired in 1917, long before the plaintiffs' first shipments upon which reparation was awarded, moved. It is the order which gives the report and findings legislative effect. It is wholly illogical to insist, as do the defendants, that the findings remain effective although the order which makes them effective expired. No cases cited by defendants in their brief sustain such an absurd contention.

In discussing this point, the defendants urge that there is a difference between the Commission's orders and re-

port and findings. That can be readily admitted, but such distinction does not alter the correctness of the ruling in the *Eagle Cotton Oil Company Case* (51 Fed. (2) 443), holding that prior to 1920 a rate order of the Commission expired by limitation in two years. We believe all of the cases cited by the defendants establish the principle that the Commission can only act in a legislative manner, i. e., exercise its administrative functions concerning rates for the future by orders, not findings. See:

Amer. Sugar Ref. Co. v. D. L. & W. R. Co., 207 Fed. 733;
C. B. & O. R. Co., v. Merriman, 297 Fed 1;

both cited on page 52 of Appellants' brief; and

U. S. v. A. B. & C. R. Co., 282 U. S. 522;

cited on pages 49 and 50 of Appellants' brief. The last case goes so far as to say:

> "No case has been found in which matter embodied in a report and not followed by a formal *order* has been held to be subject to judicial review." (Page 527).

How, if the report and findings are not subject to judicial review, can they be said to establish rates? We hardly believe our opponents would care to establish the principle that the Commission might prescribe rates by findings which would not be subject to judicial review.

Other cases cited by defendants on this point do not sustain in any manner their position. For example, *Western Paper Makers' Chem. Co. v. U. S., 271 U. S. 268,* (cited page 55 of Appellants' brief). They quote an excerpt from this opinion dealing with findings of the Com-

mission, but the real question before the court was the order issued by the Commission after the findings had been made. This is apparent from the opening sentence of the opinion, which reads:

> "This suit . . was brought . . to enjoin in part, and to modify, certain *orders* of the Commission."

This case lends no support to the argument of the defendants, that it is the finding which establishes the rate. Quite the opposite, it shows that it is the Order which makes the findings effective.

To the same effect is another case, *Vir. R. Co. v. U. S., 272 U. S. 658,* cited on page 56 of their brief. The suit involved the order of the Commission, as evidenced by the following statement on page 662, by Justice Brandeis:

> "This suit was brought by the Virginian against the United States, the Interstate Commerce Commission, and the Chesapeake and Ohio, in the federal court for the Southern District of West Virginia, *to enjoin the enforcement of the Order and to set it aside.*" (Emphasis supplied).

If the findings of the Commission have the force and effect insisted upon by our opponents, why then are all these actions which are brought by other railroad carriers directed at the orders, not the findings? In fact, one of the cases cited by them, *U. S. v. A. B. and C. R. Co. (supra),* stated no action could be taken against the findings.

Not a single case cited by defendants in their brief holds that the Commission establishes rates by its findings; but on the contrary, they uniformly hold that rates

can only be established by the orders of the Commission.

An examination of Section 14 of the Transportation Act relied upon by defendants proves the error of their own contention. This section reads:

> "*Reports of investigations by Commission.* Whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, *together with its decision, order, or requirement in the premises;* and in case damages are awarded such report shall include the findings of fact on which the award is made."
>
> 49 U. S. C. A., Title 49, Sec. 14.

It is apparent from this section that Congress simply intended that no order be issued by the Commission as a result of an investigation without the Commission also making a report stating its conclusions, i. e., basis for its order. This court in the *Wholesale Grocery Case* recognized "*the essential unity* of a report and an order promulgated by the commission", and cited the decision of the Supreme Court in the *Arizona Grocery Company Case* as authority. (Page 609, 68 Fed. (2) 601). The argument of the defendants in the present cases ignores entirely this principle of unity.

The carriers cite *Southern Pacific Company v. Interstate Commerce Commission, 219 U. S. 433* (pages 53 and 54, Appellants' Brief), and state that one of the questions directly presented and passed upon in this case was whether the limitation applied to the Commission's findings as well as to its orders. *The question involved in*

this case is the validity of an order of the Commission. The portion of the opinion quoted by defendants sets forth the two reasons why the court did not consider the questions involved moot, although the two-year period had expired. These were:

First, the possible liability for reparation to which the railroads might be subjected if the legality of the order were not determined; and second, the influence and effect which the existence of "*the rate fixed for two years*", if legal, would have upon the exercise by the railroads of "*their authority to fix just and reasonable rates in the future.*" The second reason given by the court clearly points out that the rate is only Commission-made; that is, fixed by the Commission during the two-year term of the order; and that thereafter the rate is carrier-made, that is, fixed by the carriers. This is likewise true of another case cited, *S. P. Term. Co. v. I. C. C., 219 U. S. 498,* (page 54 of Appellants' Brief). Both of these cases just mentioned were dealing with the effect of the order, not the report and findings of the Commission. Nothing in either of these decisions holds that the rates fixed prior to 1920 by the Commission or the findings thereon are binding upon shipper or carrier after the expiration of the two-year period.

In the case of *Brady v. I. C. C., 43 Fed. (2) 847, affirmed in 283 U. S. 804,* cited and quoted from at length on pages 51 and 52 of Defendants' brief, the ineffectiveness of the findings of the Commission is clearly set forth. The court, among other things, said:

"An order of the Commission is analagous to the

judgment of a court, and it is well settled that the findings upon which a judgment is based constitute no part of the judgment itself even though incorporated in the same instrument. *The Judgment itself does not reside in its recitals but in the mandatory portions.* It has been expressly held that findings of the Commission embodied in its reports are not orders within the meaning of the statutes relating thereto." (Emphasis supplied).

We believe the analogy between a judgment and the Commission's orders is well stated. Certainly it is the decision—the mandatory portion of a judgment which is binding upon the parties and determines their respective rights—not the findings, as pointed out by this court.

So also, it is the order of the Commission, not the findings, which establishes or approves the rates for the future. The order in Docket 6806 having expired in 1917, the rates thereafter charged were no longer legislatively established or approved by the Commission. Nothing that the Commission had said or done in the case was any longer controlling as to the rates thereafter charged by the defendant carriers. This being true, the *Arizona Grocery Case* does not apply, and the Commission was free to grant reparations on shipments moving subsequent to the expiration date of the Order.

2. Changes made subsequently in the rates found not unreasonable in Docket 6806 destroyed any Commission-made (or approved) character which such rates theretofore might have possessed.

Defendants urge that although the rates charged plaintiffs on the shipments in question were higher than those

found not unreasonable in *Docket 6806,* the rates nevertheless remained commission-made (or approved) because the subsequent changes were authorized (Appellants' Brief, p. 37).

The rates found not unreasonable in Docket 6806 in 1915 to Tucson were 60c minimum weight 36,000 lbs. and 55c minimum weight 60,000 lbs., both from Los Angeles, California, and San Francisco, California. (R. 132). The rates charged plaintiffs on shipments involved in these cases were 84c and 86½c (all such shipments exceeding 60,000 lbs.) (R. 49 and 50). The rates prescribed by the Commission as reasonable on shipments for the reparation period were 73c and 77c (R. 37, 49 and 50). The rates charged were therefore considerably higher than the rates found not unreasonable in Docket 6806.

As above stated, defendants' attempt to explain this on the ground that the rates set forth in Docket 6806 were later changed or modified by authorized general changes (Appellants' Brief, p. 37).

The defendants will undoubtedly admit that at no time between the date of the decision in Docket 6806 and the dates of shipments here in question was the Commission called upon to consider the reasonableness of sugar rates to Tucson. But the defendants insist that these rates were changed either by the Director General of Railroads as head of the United States Railroad Administration, or in accordance with adjustments made in the general level of all rates, and they therefore remained commission-made.

This line of reasoning ignores entirely the law applicable, and the holding of many decisions hereinafter considered.

In the case of *Brimstone R. R. and Canal Co. v. U. S., 276 U. S. 104, at page 122,* 72 L. ed. 487, at 494, the Supreme Court said:

> "The general findings and permission of Ex Parte 74 and Matter of Reduced Rates did not approve of or fix any particular rate . . . Neither case approved 'any specific rate as reasonable in itself or as properly adjusted with respect to other rates nor did it justify in advance any rate which might be published as a result thereof'. In them the Commission was dealing with the whole body of rates throughout the country—were looking at the general level of all rates; and the propriety of the rates to which the Brimstone Company was party was not the subject of particular investigation or consideration."

The Supreme Court in that case cited with approval among other decisions of the Commission, S. and T. Co. v. *Director General, 61 I. C. C. 526,* in which the Commission said that its "sanction of a general adjustment does not carry with it the approval of any particular rate."

The order of the Director General in 1918 likewise was dealing with all rates, and had no particular reference to any rates on sugar; besides it was not the equivalent of an order of the Commission; and the Commission, by *Section 10* of the Federal Control Act (*40 Stat., 456*) was given the power to "suspend or set it aside."

This section authorized the Director General to initiate

rates, fares and charges, by filing the same with the Interstate Commerce Commission. It further provided that:

> " Said rates, fares, charges, classifications, regulations, and practices *shall be reasonable and just*, and shall take effect at such time and upon such notice as he (Dir. Gen.) may direct, *but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness* of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same." (Emphasis supplied.)

The action of the Director General in his Order No. 28 relied upon by defendants can not therefore be considered as equivalent to an order by the Commission. The defendants do not contend that the order of the Director General increasing the rates here in question was reviewed or considered by the Commission, or that it in any manner received the Commission's approval. This increase, by virtue of the Director's General's Order No. 28 was not commission-made, or even commission-approved. The Commission had nothing to do with it. All this was pointed out in the *Eagle Cotton Oil Company* decision.

This relationship between the Commission and the Director General was also considered in two cases cited by defendants in their brief (p. 38).

Northern Pacific Ry. Co. v. North Dakota, 250 U. S. 135, 146; 63 L. ed. 897.

Mo. Pac. R. Co. v. Ault, 256 U. S. 554-563; 65 L. ed. 1087.

The court, in the last case cited said:

> "The government undertook, *as carrier,* to observe all existing laws."

In other words, the Director General's Order No. 28 was a carrier-made (not commission-made) increase.

That the Director General occupied practically the same position as the carriers in so far as rate making was concerned, is definitely settled in the case of

> *Director General v. Viscose Co.,* 254 U. S. 498; 65 L. ed. 372,

in which the court, at page 501, said:

> "The power to suspend classifications or regulations when issued by the President was taken away from the Interstate Commerce Commission by the 'Act to Provide for the Operation of Transportation Systems While Under Federal Control', etc., *but the power over them after hearing remained,* and the power to suspend was restored when "The Transportation Act, 1920", approved February 28, 1920, became effective. *The action of the Director General of Railroads, under consideration in this case, may, therefore, be treated as if it had been taken by a carrier* subject to the Act." (Emphasis supplied.)

While this case was dealing with an order of the Director General pertaining to classifications, the same power of the Commission to review changes in rates existed. See *Section* 10, *Federal Control Act,* (40 Stat., 456), quoted above.

Therefore any action of the Director General in Order No. 28 increasing the rates must "*be treated as if it had*

been taken by a carrier subject to the Act." That is, such increase was carrier-made in nature. This being true, the rate became carrier-made, and subject to subsequent reparation awards.

The defendants cite the decision of the District Court for Arizona in

El Paso & S. W. R. Co. v. Arizona Corporation Com., 51 Fed. (2), 573,

to sustain their contention on this point. What the court there held was that all intra-state rates in Arizona were by force of a state statute commission-made or approved, and that the carrier could not under this statute initiate any such rates; that such rates, being commission-made or approved, no reparation thereon could be allowed. No consideration was given to the effect of the Director General's Order No. 28.

Finally, the defendants insist that this court in the *Arizona Grocery Case* (49 Fed. (2), 563), reached the conclusion that the intervening general change of 1922 had not operated to deprive the rates of the commission-made status conferred upon them in 1921, and that the same reasoning applies in the present case. It must be remembered that the change in 1922 was a general reduction, not an increase, such as occurred twice in the present case, first under the order of the Director General, and second under Ex Parte 74. This court in considering the rates in the *Arizona Grocery Case*, and the effect of the reduction of 1922, said:

"The ascertainment of a maximum rate is in effect

a decision that any rate below that maximum is reasonable as to the shipper. There was no change in the *subsequent action of the Commission or of the carriers which affected the maximum;* and no change in the maximum by the Commission because the voluntary act of the carrier in *reducing* its rate to 86.5 made an order unnecessary. The nature of this blanket order of the Commission was considered by the Supreme Court in *Brimstone R. R. and Canal Co. v. U. S.*, 276 U. S. 104." (Emphasis supplied.)

49 *Fed.* (2), 563, at page 571.

This statement does not lead to the conclusion that an increase of rates by an order of the Director General (Director General Order No. 28), or by a general order of the Commission (Ex Parte 74), makes such increased rates conclusively just and reasonable, and free from reparation.

3. SUMMARY OF PART I OF BRIEF

Concluding this first portion of our brief, we feel that it is hardly necessary to point out that the Commission has jurisdiction, as the administrative tribunal created by the Commerce Act, to find that rates which have been charged by railroads for the interstate transportation of property in the past have been unreasonable or otherwise unlawful, and to make awards of reparations to shippers for the exaction of charges on past shipments under such unlawful rates. This jurisdictional power is created by the Act.

Sec. 8; Sec. 9; Sec. 13 (1); Sec. 16 (1); 49 U. S. C. A.

And is amply and fully sustained by the decisions of the Supreme Court.

Texas & P. Ry. Co. v. Abilene C. O. Co., 204 U. S. 426; 51 L. ed. 553;
L. & N. R. Co. v. Sloss-Sheffield Iron Co., 269 U. S. 217; 70 L. ed. 242;
Mills v. Lehigh Valley R. R. Co., 283 U. S. 473; 59 L. ed. 1415;
Meeker v. Lehigh Valley R. R. Co., 236 U. S. 412; 59 L. ed. 645.

We have previously shown that the rates charged on the shipments involved in the instant cases were not rates which had been fixed or approved by the Commission as just and reasonable, because the effectiveness of *Docket 6806* had expired in 1917, and in addition subsequent changes had destroyed any commission-made (or approved) character which such rates possessed long before the shipments involved in these cases were made.

Thus the rates charged plaintiffs during the period of reparation were carrier-made. It therefore follows that the Commission's awards of reparation in favor of the plaintiffs are valid and should be enforced.

Arizona Gro. Co. v. A. T. & S. F. Ry. Co., 284 U. S., 370, 390.

II.

THE TRIAL COURT IN THE INSTANT CASES FOUND THE RATES CHARGED PLAINTIFFS WERE UNREASONABLE, AND THAT PLAINTIFFS ARE ENTITLED TO RECOVER REPARATIONS FROM THE DEFENDANTS. THIS DECISION OF THE TRIAL COURT SHOULD BE APPROVED.

1. The Commission's determination of the unreasonableness of the rates charged was conclusive on the Trial Court.

Defendants correctly anticipated (as set forth on page 75 of their brief) that plaintiffs would urge that the Commission's determination in *Docket 16742* of the unreasonableness of the rates charged had to be taken as conclusive by the Trial Court, and also by this court.

Defendants in answer to this position of plaintiffs cite many cases, but none deal as directly with the issue presented as do the three cases referred to in defendants' brief, the effectiveness of which the defendants attempt to destroy. We have in mind:

So. Carolina Asparagus Growers Assn. v. So. Ry. Co., 64 Fed. (2) 419;
Glenn Falls Portland Cem. Co. v. D. & H. Co., 66 Fed. (2) 490;

both decided in 1933 by two different Circuit Courts of Appeal (2nd and 4th), and the decision of the Supreme Court of the United States in,

Mitchell Coal and Coke Co. v. P. R. Co., 230 U. S. 247; 57 L. ed. 1472.

The decisions of both of the Circuit Courts of Appeal are based upon the remarks of Justice Lamar in the *Mitchell Case* (supra). In order fully to appreciate the significance and logic of these remarks it is necessary to read a substantial portion of the decision in the *Mitchell Case*, particularly appearing on pages 255-260 of the official report. We shall not attempt in the limited space of this brief to repeat the reasons for the rule set forth in that decision, except to point out the unassailable logic that any rule which does not make the decision of the Commission

on the question of reasonableness conclusive in reparation cases will destroy the principle of uniformity of rates required under the Act. This reasoning led to the principle set forth by Justice Lamar on pages 257 and 258, that where the suit is based upon unreasonable charges

> * * * "the whole scope of the statute shows that it was intended that the Commission and not the courts should pass upon that administrative question," * * * "such orders, so far as they are administrative, are conclusive, whether they relate to past or present rates, and can be given general and uniform operation, since all shippers who have been or may be affected by the rate can take advantage of the ruling and avail themselves of the reparation order. They are quasi-judicial and only prima facie correct in so far as they determine the fact and amount of damage,—as to which, since it involves the payment of money and taking of property, the carrier is by Section 16 of the Act given its day in court and the right to a judicial hearing."

Defendants cite the recent case of *Baltimore and O. R. Co. v. Brady,* 288 U. S. 448, as authority for a different rule, but an analysis of this decision discloses that it also recognizes the necessity of the rule of uniformity so forcibly pointed out by Justice Lamar in the *Mitchell Case.* On pages 456 and 457 the court said:

> "Questions as to the reasonableness of rules and regulations (also as to rates) * * * are for the Commission.
>
> "The facts stated in the complaint clearly show that there was *no question in this case requiring the exercise of the Commission's administrative power.*

> "The decision does not concern the reasonableness or validity of the rule itself and *it has no tendency against uniformity or other purpose of the Act.*" (Emphasis supplied.)

The question early arose as to whether a shipper in seeking reparation should first be compelled to secure a finding of the Commission that the rates charged were unreasonable. There are provisions in Section 9 of the Act which would indicate the shipper might go directly into court and there prove that the rates charged were unreasonable, without a previous finding of the Commission. The Supreme Court of the United States held however, in the case of *Texas & P. R. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, that notwithstanding these provisions of Section 9, and in order to secure unformity of rates and to avoid preference and discrimination, it was necessary for the Commission to find the rates in question unreasonable. In passing upon this question the court, on page 446, said:

> "In other words, the difference between the two is that which, on the one hand, would arise from *destroying the uniformity of rates which it was the object of the statute to secure*, and, on the other, from enforcing of that equality which the statute commands."

Under the contention of defendants different courts and different juries would reach different conclusions as to the reasonableness of a rate. Uniformity of rates would be destroyed and preference and discrimination would exist.

We submit that this court should adopt a rule which

will result in uniformity of rates; in other words, the rule set forth in the *Mitchell Case,* requiring the administrative order of the Commission on the question of reasonableness to be taken as conclusive. Any other rule would tend to destroy the principle of uniformity of rates.

The fact and amount of damage to plaintiffs by reason of the assessment of the rates found unreasonable was not disputed by defendants. The proof on these questions was clear and convincing (R. 124-125; and 37, 41, 49, 50 and 53). No attempt was made to contradict the facts set forth in this evidence.

The finding of unreasonableness being conclusive on the Trial Court, the fact and amount of damage being undisputed, the District Court properly rendered judgments for plaintiffs.

2. Whether a rate is reasonable or unreasonable is a question of fact. The report and findings in Traffic Bureau, et al v. A. T. & S. F. Ry. Co., 140 I. C. C. 171, and the awards of reparation made in favor of the plaintiff constituted a prima facie case before the Trial Court which the defendants failed to overcome. The decisions of the Trial Court, being supported by substantial evidence, they are therefore conclusive on appeal as to this question of fact.

There are ample and conclusive reasons why the judgments in these cases should be affirmed, even if we accept the theory of defendants that all of the issues were before the District Court, including the question of unreasonableness of the rates charged.

Under this theory defendants assert that the trial in the District Court was de novo, and that the question of the reasonableness or unreasonableness of the rates involved

was before the court for determination. Defendants have, however, apparently lost sight of the fact that the question of whether a rate is reasonable or unreasonable is a question of fact, and not one of law.

Ill. Cent. R. R. Co. v. I. C. C., 206 U. S. 441; 51 L. ed. 1128;
T. P. R. Co. v. I. C. C. 162 U. S. 197; 40 L. ed. 940;
Cin., N. O. & T. R. Co. v. I. C. C., 162 U. S. 184; 40 L. ed. 935;

and many other cases to the same effect.

The District Court found that the freight charges assessed the plaintiffs on the shipments involved were unreasonable to the plaintiffs, and in violation of the Interstate Commerce Act. (Finding of Fact, R. 255). The present cases as stated in defendants' brief were tried to the court without a jury, jury having been waived. (R. 68 and 69).

Therefore, even under the theory of defendants, the sole question before this court is whether there was substantial evidence to support this finding. If so, then such findings should not be disturbed.

The rule in such cases is that on appeal the judgment of the trial court in an action tried before the court without a jury, is conclusive if supported by substantial evidence, and such evidence must be considered in a light most favorable to appellee.

U. S. v. Linde, 71 Fed. (2), 925;
Victor Talking Machine Co. v. George, 69 Fed. (2), 871;

Mandel Brothers v. Henry A. O'Neill, Inc., 69 Fed. (2), 452;
Aberly v. Craven County, 70 Fed. (2), 52;
Bayless v. Gage, 69 Fed. (2), 269;
Kurecki v. Buck, 71 Fed. (2), 227.

And many other cases too numerous to cite.

Let us examine the amount and character of the evidence introduced and considered by the court.

Plaintiffs introduced into evidence without objection on the part of the defendants the following:

(1) Copy of Opinion and Order of Interstate Commerce Commission in *Docket 16742* and associated cases. *Traffic Bureau v. A. T. & S. F. Ry. Co.*, 140 I. C. C. 171, (R. 123, 124).

(2) Copy of orders by Interstate Commerce Commission for payment of reparations to plaintiffs in these cases. (R. 40-41 and 52-53).

(3) Copy of certain statements (Rule V, Statements), showing shipments made to and received by plaintiffs upon which reparations allowed (R. 125, 37, 49 and 50).

After the introduction of defendants' testimony, plaintiff offered additional evidence, through the witness L. G. Rief (R. 218), who it was stipulated was qualified as an expert familiar with rates and tariffs, and competent to file exhibits showing such rates and tariffs. This witness stated he was rate expert for the Arizona Corporation Commission and had been so employed since 1925, and submitted a statement comparing rates prescribed for reparation purposes in the present cases with Memphis-

Southwestern Sugar rates and 120% of Memphis-Southwestern sugar rates, together with other information (R 218 and 220). This witness testified on cross examination that he believed that Arizona points were entitled to rates less than 120% of the Memphis-Southwestern scale but that this exhibit was based on statement of Commission in *Docket 16742,* that defendant carriers subscribed to a basis of rates from California to Arizona which is about 120% of rates for same distances under the Memphis-Southwestern scale (R. 223).

Mr. J. L. Fielding, a witness for defendants, stated under cross examination that Phoenix, Arizona, up to November 7, 1926, was on a branch line, that a rate might be reasonable to Phoenix, higher than to a point on the main line, and that prior to 1921 carriers charged higher rates to Phoenix than to main line points (R. 214); that Globe, Arizona, was on a branch line and was never on the main line of the Southern Pacific Railway; that Tucson has always been a main line point, that defendants' Exhibit "F" did not show reduction of rates as actually charged to Phoenix (R. 215); and that he did not know of any decision of the Interstate Commerce Commission since *Docket 6806* (decided May 1, 1915) which dealt specifically with rates to Tucson. (R. 214).

On the other hand defendants introduced none of the evidence introduced before the Interstate Commerce Commission in *Docket 16742,* and associated cases. Practically all of the evidence of defendants on the question of fact as to the reasonableness of the rates dealt with the history of rates to Tucson (R. 200 and 201), and with compari-

sons with rates to Phoenix, Globe and Safford (R. 202 and 203).

Regardless of defendants' assertions to the contrary, the findings in *Docket 16742* were "prima facie evidence of the facts therein stated." This is settled by the Commerce Act itself.

49 U. S. C. A., Sec. 16 (2).

These findings specifically stated that the Commission found that the rates to Tucson had been unreasonable to the extent that they exceeded 73 and 77 cents from the Southern and Northern California groups respectively (R. 26); and they further found that complainants (including these plaintiffs) had made shipments at rates found to have been unreasonable; that they paid and bore the charges thereon, and were damaged thereby to the amount of the difference between the charges paid and those which would have accrued at the rates found reasonable, and that they were entitled to reparation with interest. (R. 25-27). The reasons for these findings are also set forth at length in this report (R. 8-27 inc.). All this was before the court as *prima facie* evidence in support of plaintiffs' case; as was also the evidence of L. G. Reif and the evidence of witness Fielding above referred to.

Defendants have attempted to destroy the value of the findings in *Docket 16742* on the ground that the reparation awards to shippers at Phoenix, Clarkdale, Globe and Safford, were held invalid in the *Arizona Grocery Case*, the *Wholesale Grocery Case*, and *T. F. Miller case* (District Court). Their argument is unsound. In the case of *Spiller v. A. T. & S. F. R. Co.*, 253 U. S. 117, 64 L. ed 810,

the court was considering an award (including the findings thereon) which was partially invalid. On this point the court said:

> "If there be doubt whether it was sufficient to sustain each and every claim that was allowed, we are not now concerned with this; the ruling in question being the refusal of the trial court to treat the award as void in toto. This was not erroneous if, to any substantial extent, the award was legally valid. If a part only of the claims was unsupported by evidence, the request for an adverse ruling should have been directed to these." Page 132.

The findings in Docket 16742 dealt with many, in fact all, points in Arizona. While awards to Phoenix, Globe and Clarkdale, might have been invalid because of earlier decisions by the Commission, this should not be controlling on other points.

In a sense, under the contention of the defendant carriers, these cases very largely turn on whether or not the Interstate Commerce Commission, when it prescribed a rate to Phoenix in the First Phoenix Case, it did not also prescribe and fix all rates to all points in Arizona at the same time, although absolutely no mention is made of this fact in the First Phoenix Case; no evidence was introduced or any record made as to any rate except those to Phoenix; and no other rates to any other points in Arizona were under attack. The syllabus in the First Phoenix Case reads:

> "Rates on sugar in carloads from *California points to Phoenix, Arizona,* found unreasonable. Reasonable rates prescribed for the future. R. 138.

In the *Arizona Grocery Case,* the Supreme Court pointed out that the great mass of rates will continue to be carrier-made rates, and upon which the Commission may award reparation. Under the contention now being advanced by the defendants, practically all rates throughout the United States would be commission-made, simply because rates at some particular points have been fixed and prescribed by the Commission.

The defendants insist that a comparison of rates to Phoenix was conclusive on the court. No attempt was made to show that the rates prescribed by the Commission to Tucson for the periods of reparation were confiscatory. No evidence as to costs of operation for these hauls was introduced. The defendants would suggest that the comparison of rates is the sole factor in determining the reasonableness of rates. This is incorrect, and the carriers are aware of it.

Just a brief quotation from a report of the Commission itself:

> "The problem is difficult, the facts to be considered multitudinous and of an infinite variety of modifying conditions, from which the Commission, without applying any policy which runs counter to the power granted and the duty imposed upon it, seeks by "slow evolution" to develop a satisfactory system of rates."
>
> *Advances in Rates, Western Case,* 201 I. C. C., 307, 379.

There are many other statements of the Commission in many other decisions to the same effect.

One court has expressed it as follows:

"A careful examination of the opinions of that court (as well as the evidence taken in these cases) shows that there are a great many factors and circumstances to be considered in fixing a rate. Noyes, Am. R. R. Rates, pp. 61, et seq., 85-109. Among other things: (1) The value of the service to the shipper, including the value of the goods and the profit he could make out of them by shipment. This is considered an ideal method, when not interfered with by competition or other factors. It includes the theory so strenuously contended for by petitioners, the Commission, and its attorneys, of making the finished product carry a higher rate than the raw material. This method is considered practical, and is based on an idea similar to taxation. I. C. C. v. B. & O. Ry. Co. (C. C. 43 Fed. 37, 53; Noyes, Am. R. R. Rates, 53). (2) The cost of service to the carrier would be an ideal theory, but it is not practical. Such cost can be reached approximately, but not accurately enough to make this factor controlling. It is worthy of consideration, however. I. C. C. v. B. & O. Ry. Co., 43 Fed. 37, 3 I. C. C. 192; Ransome v. Eastern Counties Ry. Co. (1857), I. C. B. N. S. 437, 26 L. J. C. P. 91; Judson on Interstate Commerce, pars. 148, 149; Western Union Tel. Co. v. Call Pub. Co., 181 U. S. 92, 21 Sup. Ct. 361, 45 L. ed. 765; I. C. C. v. Detroit, Grand Haven & Milwaukee R. Co., 167 U. S. 633, 17 Sup. Ct. 986, 42 L. Ed. 306. (3) Weight, bulk and convenience of transportation. (4) The amount of the product or the commodity in the hands of a few persons to ship or compete for, recognizing the principle of selling cheaper at wholesale than at retail. I. C. C. v. B. & O. Ry. Co., 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699. (5) General

public good, including good to the shipper the railroad company and the different localities. The I. C. C. v. B. & O. Ry. Co., 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699. (6) Competition, which the authorities as well as the experts, in their testimony in these cases, recognize as a very important factor. * * * None of the above factors alone are considered necessarily controlling by the authorities. Neither are they all controlling as a matter of law. It is a question of fact to be decided by the proper tribunal in each case as to what is controlling."

I. C. C. v. Chicago Gw. R. Co. 141 Fed. 1003-1015.

Aff: 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. 493.

This being true, it is absurd, it seems to us, for the defendants to point to one rate comparison as conclusive and controlling in the present cases and thus attempt to exclude all other factors. It must be recognized that the Commission in *Docket 16742* had many factors before it in making its decision, including the following: (1) the amount of haul, (2) a comparison with the Memphis-Southwestern and the Consolidated Southwestern rates, (3) the consumption of sugar in the territory involved, (4) the 4th Section of the Transportation Act, (5) the change in sugar shipping conditions, and finally (6) general transportation conditions from California to Arizona. The report and findings of the Commission being before the court as *prima facie* evidence, these matters were therefore also before the court for consideration.

In addition the Commission has said that the mere fact that rates appear out of line with other rates to which they are closely related is not of itself sufficient to afford a basis for finding of reasonableness or unreasonableness.

City Coal Co. v. New York, 123 I. C. C. 609;
Dallas Paper Co. v. T. & N. R. Co., 132 I. C. C. 59;
Peabody Lbr. Co. v. Penn. R. Co., 132 I. C. C. 741.

The Commission has also said in considering the comparison of *per ton per mile* revenue of rates (as defendants attempted to do here, R. 202), such method of testing freight rates cannot be taken as a controlling rule in determining the reasonableness of rates.

2 I. C. C. 52
23 I. C. C. 519
40 I. C. C. 195
47 I. C. C. 44
81 I. C. C. 552.

In the case of *Railway Express Agency v. United States,* 6 Fed. Supp. 249, the court said it would not set aside Interstate Commerce Commission findings that certain rates were reasonable on the ground that such findings were inconsistent with findings made in other procedings before the Commission.

All of Defendants' argument on this point is to the effect that the Commission having fixed the rates to Phoenix, Globe, and Clarkdale, and the Supreme Court and this Court having held that reparation could not be allowed to these points, that it follows that reparations could not be allowed to other points in the state, although the rates to such points had never been prescribed by the Commission. The defendants even work themselves up by the sophistry of their own argument to declare, on page 98 of their Brief, that the Commission by prescribing the reasonableness of the rates to Globe and Phoenix

also thereby prescribed the reasonableness of all rates in Arizona on sugar, and therefore under the *Arizona Grocery Case* and the *Wholesale Grocery Case* reparation cannot be allowed to any other points in Arizona, notwithstanding the fact such other rates were carrier-made; and also notwithstanding the fact that such other points of destination had never had their day before the Commission on the question of the reasonableness of their rates. Such reasoning is absurd. The effect of sustaining such argument would be equivalent to saying that whenever the Commission fixes a rate to one point the rates to all other points, at least in that particular state, are also conclusively fixed, although such other points had not been present or represented in such hearing. What a travesty on justice—that rights could be taken away in this fashion without an opportunity to be heard.

The defendants in the same vein argue to this court that while the findings of the Commission are merely *prima facie,* the rates to Globe, Clarkdale, and Phoenix, are conclusive, and therefore such rates must prevail over the *prima facie* character of the findings. This statement is wholly unfounded. The rates only to these places named were conclusive; but the rates to Tucson, the point here involved (and most of the other points in this state) had not been fixed conclusively, and the showing of the defendants had no such effect as to override the *prima facie* character of the findings.

If we analyze defendants' theory of comparing rates in effect to Phoenix with rates to Tucson, we find sufficient reasons for the trial court not accepting such comparisons

as overcoming the *prima facie* effect of the findings and orders in *Docket 16742* and associated cases.

In making a comparison with Phoenix, the defendants take as the rate 96½c to this point (Defendants' Exhibit "F", R. 202). As a matter of fact, this rate was only in effect to Phoenix from July 1921 to July 1, 1922, when it was reduced to 86½c as a result of the reduced rates of 1922, and again reduced to 84c in 1923; and as a result of *Docket 14449*, (Second Phoenix Case), *95 ICC, 244*, the reasonable rate to Phoenix was fixed at 71c, effective February 25, 1925. (Record of rates to Phoenix see history in decision of this court, Arizona Grocery Company case 49 Fed. (2), 563. Also evidence of defendant's witness Fielding on cross examination, R. 212-215). None of the shipments here in question moved during the period when the 96½c rate was in effect to Phoenix, some moved during the period the rate to Phoenix was 84c, and *a substantial part moved after the rate to Phoenix had been reduced to 71c*, (Plaintiffs' Exhibit "B", R. 37, and Plaintiffs' Exhibit "A", R. 49 and 50). This fact alone would indicate the unreasonableness of the rates to Tucson. The rates prescribed by the Commission as reasonable on these shipments for the reparation period were 73c and 77c (R. 37, and 49 and 50; and R. 25 and 26).

The defendants' witness J. L. Fielding admitted that Defendants' Exhibit "F" did not show rates actually charged to Phoenix, but only the maximum rate prescribed in the *First Phoenix Case* in 1921.

It is therefore clear that when the rates actually charged to Phoenix are compared with rates prescribed by the

Commission as reasonable to Tucson for the reparation period, the trial court was justified in its finding of unreasonableness of the rates charged plaintiff.

In addition the Interstate Commerce Commission itself found that the 96½c rate to Phoenix was based on an insufficient and incomprehensive record (*Docket 16742,* R. 25). In fact it is well to review exactly what the Commission said in this regard:

> "For the first time the record before us is comprehensive in the evidence which it contains bearing upon the reasonableness of the rates assailed." (R. 25.)

This court and the Supreme Court has held that even though the Commission did prescribe the maximum rate of 96½c to Phoenix on such an incomplete record, it could not later ignore the rate so prescribed and allow reparation on a lesser rate to Phoenix. This holding, however, does not destroy the effect of the statement of the Commission in this regard when the reasonableness of rates to other points are being compared with a rate so improperly fixed.

Surely no one can logically or fairly argue that such a rate so made (i. e. on an incomprehensive and insufficient record) should have been taken by the trial court as conclusive in determining the reasonableness of rates to other points. The *First Phoenix Case* shows all that was done was to give Phoenix main line rates; that no attempt was made to pass on main line rates or on rates to other points in Arizona (R. 145, 146).

The record in the *Second* and *Third Cases* shows clearly that the Commission recognized that an unreasonably high

maximum rate was prescribed in the *First Phoenix Case*. This must be considered, regardless of the fact that such rate had to be taken as conclusively just and reasonable to Phoenix for the purpose of disallowing reparation to such point.

The maximum rate of 96½c to Phoenix having been prescribed by the Commission on an incomprehensive and insufficient record, resulted in an injustice to Phoenix shippers, who were thereby prohibited from recovering reparation. The rates to Tucson not being commission-made during the period of these shipments, there is no reason, either in law or in equity, why the rights of the plaintiffs should be restricted or concluded by the injustice of the Phoenix situation. The wrongs to them should be corrected. The Commission having found the rates to Tucson unreasonable, the carriers cannot complain in being compelled to repay the overcharges, for they are only entitled to reasonable rates.

In this connection we would call the court's attention to the fact that the defendant carriers did not introduce in the trial of the present cases the evidence which was introduced before the Commission in *Docket 16742*. In the absence of this evidence the following rule is applicable:

> "The settled rule is that the findings of the Commission may not be assailed upon appeal in the absence of the evidence upon which they were made. Spiller v. Atchison, T. & S. F. R. Co. 253 U. S. 117, 125, 64 L. ed. 810, 817, 40 S. Ct. 466; Louisiana & P. B. R. Co. v. United States, 257 U. S. 114, 116, 66 L. ed. 156, 158, 42 S. Ct. 25; Nashville C. & St. L. R. Co. v. Tennessee, 262 U. S. 318, 324, 67 L. ed. 999, 1003, 43

S. Ct. 583; Edward Hines Yellow Pine Trustees v. United States, 263 U. S. 143, 148, 68 L. ed. 216, 220, 44 S. Ct. 72; Chicago, I. & L. R. Co. v. United States, 270 U. S. 287, 295, 70 L. ed. 590, 595, 46 S. Ct. 226.

The appelant did not free itself of this restriction by submitting additional evidence in the form of affidavits by its officers. For all that we can know, the evidence received by the Commission overbore these affidavits or stripped them of significance. The findings in the report being thus accepted as true, there is left only the inquiry whether they give support to the conclusion. Quite manifestly they do."

Mississippi Valley Barge L. Co. v. United States, decided April 30, 1934; 290 U. S. .....; 78 L. ed. .....

The defendants cite as authority for this court reversing the finding of the lower court on the question of fact as to unreasonableness, the case of *Southern Ry. Co. v. Eichler,* 56 Fed. (2) 1010.

When we remember that the question of reasonableness is a question of fact, not law (this has previously been shown by ample and undisputed authority), we find that this case is no authority for the position of defendants. In the case cited the Appellate Court was reviewing a question of law, which is always open to review. This is clearly shown by the following excerpt from the opinion in that case:

"In this view, the question at issue resolved itself in *one of law,* requiring the construction of a tariff."

"What construction shall be given to a railroad tariff presents ordinarily a question of law."

After all, the situation here presented is simply that con-

siderable evidence was introduced before the lower court, some documentary, some by oral and documentary testimony of expert witnesses, substantiating the plaintiffs' case. Upon this evidence the court made its findings, which should not be here disturbed. See authorities *supra,* also the following:

> "The only question with which this court can be concerned upon review is whether there was any substantial evidence to support the findings of the trial court."
>
> *Kurecki v. Buck,* 71 Fed. (2), 227, 229.

This court recently decided the case of *U. S. v. Alger,* 68 Fed. (2), 592, 593. In this case the court said:

> "The record discloses some conflict in the opinions of the expert witnesses, but such disagreement, together with the weight to be given the opinion and evidence, were all for the consideration of the jury."

It has been otherwise stated:

> "It is not within our province to usurp the authority of that court by substituting our judgment for its judgment in the ascertainment of facts when the evidence supports such findings."
>
> *So. Ry. Co. v. Blue Ridge Power Co.,* 30 Fed. (2), 33, 40.

This court has also said:

> "We do not weigh the evidence; what our verdict would have been as jurymen is immaterial."
>
> *United States v. Dudley,* 64 Fed. (2), 743, (9th C. C. A. decided April 1933).

The same holds true where the matter has been tried to the court.

Appellate courts will not disturb findings of fact where the evidence is conflicting.

Mitchel Coal & Coke Co. v. P. R. Co., 230 U. S. 247, at 256.

Applying these rules, it is clear that the findings of fact of the District Court on the question of the unreasonableness of the rates charged plaintiffs should not be disturbed.

3. The question of discrimination is not properly before this court, and in any event is not an issue that can be raised by defendants.

Defendants in this court raise the issue that to sustain the awards of reparations granted plaintiffs would result in unlawful discrimination. (Beginning on page 81, Appellants' Brief.) This issue was not presented to the Trial Court. No mention of discrimination is made in either plaintiffs' complaint (R. 3 and 42) or in defendants' answers (R. 58 and 62). What constitutes discrimination is a question of fact.

I. C. C. v. So. Pac. Co., et al, 123 Fed. 597, 601.

Tex. & Pac. Ry. Co. v. I. C. C., 162 U. S. 197, 220; 40 L. ed. 940, 946;

I. C. C. v. Ala. Midland Ry. Co., 108 U. S. 144, 170; 42 L. ed. 414.

Therefore, to have raised this question it should have been pleaded. Defendants did not ask for a finding of fact by the trial court upon the question of discrimination (R. 236-249).

No mention is made of the question of discrimination in defendants' Assignments of Error. (R. 276-315). This question cannot therefore be raised in this court for the first time, and it is therefore not open for consideration in this appeal.

Louie Share Gan v. White, 258 Fed. 798 (C. C. A. 9th);

Wight, et al. v. Washoe County, 251 Fed. 819 (C. C. A. 9th);

Behn, Meyer Co. v. Campbell, et al., 205 U. S. 403; 51 L. ed. 857.

There is another reason why this issue of discrimination cannot be considered in these cases. The Supreme Court has stated that the question of prejudice and discrimination is not one that can be raised by the defendant carriers. In the case of *Interstate Commerce Commission v. Chicago, R. I. and P. Ry. Co. et al.,* 218 U. S. 88, the carriers were attacking an order of the Commission on the basis that it was discriminatory; just as the defendants are here attacking the present orders. To this the court answered, at page 108:

> "That the companies (railroads) may complain of the reduction made by the Commission so far as it affects their revenues is one thing. *To complain of it as it may affect shippers or trade centers is another. We have said several times that we will not listen to a party who complains of a grievance which is not his.* Clark v. K. C., 176 U. S. 114, 118; 44 L. ed. 392, 396; Smiley v. Kansas, 196 U. S. 447; 49 L. ed. 546." (Emphasis supplied.)

It must be remembered that other shippers and localities in Arizona are not complaining about discrimination or prejudice. There is no objection on their part to the defendants complying with the orders of the Commission and paying these plaintiffs. Until the question of discrimination and prejudice is raised by these shippers and the localities themselves, it is no concern of the defendants.

At no place in the brief of the defendants is any contention made that the rates in question are confiscatory. No attempt is made to show that the rates allowed by the Commission would result in confiscation of the property of the defendant. Without this we believe that the entire force of their argument falls.

In addition to the foregoing conclusive reasons why the issue of discrimination should not be considered here, the following facts show this contention is improper: At the same time these cases now on appeal were being tried in the District Court, there were several others also being heard involving reparation orders on shipments of sugar to Prescott, Kingman, Williams, Flagstaff, Holbrook, and Yuma, Arizona. All of these reparation orders arose out of, and were based on, the findings in *Docket 16742*. Judgments were entered by the District Court in each of these cases in favor of the plaintiffs, i. e. sustaining the awards, just as judgments were entered in the present cases. The evidence introduced was essentially the same in all of the present cases then being tried, except as to the particular shipments to the various points and the specific awards of reparation thereon. Notwithstanding all that has been argued by the defendants in the present cases on appeal, the

carriers satisfied these judgments, i. e. paid the reparations to the points above mentioned.

Appendix "A" appearing at the conclusion of this brief shows, (1) the approximate location of the points at which the carriers have already paid the reparations, (2) the rates found reasonable to these points for reparation purposes, and (3) the points here concerned, together with rates found reasonable for reparation purposes. The seven points at which the awards have been paid are underlined in red, the point here involved is underlined in green.

As the carriers have already paid the reparation awarded to complainants at these several points, it irresistibly follows that their argument that unjust discrimination and undue prejudice would result if the awards here on review were ordered paid, is obviously untenable. Just the reverse is true.

4. No error occurred in the introduction of evidence before the Trial Court.

Defendants base their objection to the introduction of the testimony of witness Rief and plaintiffs' Exhibit No. 5, on four grounds: (1) the exhibit was not prepared by witness Rief; (2) this evidence was not proper rebuttal, and was cumulative; (3) the exhibit contained certain additions and omissions as to the destinations, rates, and distances involved; and (4) this evidence was contradicted by certain other evidence. (Defendants' Brief, pp. 89, 90). We shall deal with them in this order.

(1) As to the exhibit not being prepared by the witness, the record discloses that he checked the exhibit to see

that it was correct, and helped to a certain extent in its preparation (R. 223). We believe this ample and sufficient to justify its acceptance by the court. Clearly the test in such cases is that the witness testify that the exhibit is correct. Mere preparation by the witness would not signify that it was correct. Here Rief testified that he had checked the exhibit before its introduction and found it correct, and in addition had helped in its preparation.

(2) As to the argument that the exhibit is cumulative and not proper rebuttal, the defendants cite *Section 3807, Revised States of Arizona, 1928,* which deals with the order of trial by jury. The same order is generally followed in cases tried by the court, but the rules are greatly relaxed as to the introduction of evidence. In addition, the next section of the Arizona Code following the one cited by defendants, *Section 3808,* provides for reopening cases at the discretion of the trial court. In the case of *De Mund v. Benson, 265 Pac. 84,* the Supreme Court of Arizona stated that the trial court has wide discretion in such matters. This is the universal rule. In fact, it is clearly stated in another authority cited by defendants, *24 California Jurisprudence.* On page 764 of this work it says:

> "The admission of testimony out of its proper order is a matter resting in the discretion of the court, and in the absence of manifest abuse of that discretion, the ruling will not be disturbed on appeal." (Page 765.)
>
> "The order of proof must be regulated by the sound discretion of the court. Such discretion will not be interfered with by a reviewing court unless it has been

abused to the substantial detriment of the party complaining." (Page 764.)

Defendants failed to point out how there had been any "substantial detriment" to them by the introduction of this testimony in the manner permitted by the trial court.

(3) As to the third ground, that the exhibit contained certain additions and omissions, this would be unsound, even if true. Such complaint would go to its evidentary value, not its competency. In other words, the court could consider these facts in valuing its weight. However, it is incorrect to say there were any improper additions or omissions in the exhibit. The witness Rief testified what the exhibit purported to show (R. 218), and in that regard it was complete (R. 220-221). If the defendants felt there were other matters to be considered not shown in the exhibit, they were at liberty to call them to the court's attention. A similar situation existed as to defendants' Exhibit "F", (R. 202). On cross examination defendants' witness Fielding admitted that it did not contain certain facts pertaining to the rates on sugar to Phoenix (R. 215). However, the court correctly admitted the exhibit for what it purported to be, and for what it was worth. Again, as shown later in this brief, the matter being tried to the court without a jury, the court possessed wide discretion in passing upon the question of competency of the evidence.

(4) As to the fourth ground, that the testimony and exhibit were contradicted by certain other evidence, it is to be noted that no authority is cited by defendants on the point. The fact that certain testimony is contradicted by other testimony does not make it incompetent. The

weight of the evidence and the credibility of the witnesses is a question to be passed upon by the court in deciding the issues presented. Cyc. on Fed. Procedure, vol. 2, p. 709. If the rule insisted upon here by defendants were applied, a large part of defendants' own testimony should be stricken because it conflicts with testimony of the plaintiff. No such rule, of course, exists.

Finally, this point should have little or no weight. The cases having been tried to court without a jury, strict rules of evidence do not apply. The erroneous admission of evidence in cases tried by a court sitting without a jury is not grounds for reversal. *Chicago B. & L. Co. v. City of Pittsburgh,* 271 Fed. 678. In an opinion recently written by Judge Sawtelle, this court held that the presumption on appeal is that any testimony erroneously admitted by a chancellor was disregarded.

National Res. Ins. Co. v. Scudder, 71 Fed. (2), 884.

The general rule is that judgment rendered after trial by a court without a jury will not be reversed for admission of incompetent evidence, where there is sufficient competent evidence to sustain the finding.

South Fork Brewing Co. v. United States, 1 Fed. (2), 167, cert. den. 266 U. S. 626, 69 L. ed. 475;

Cascaden v. Bell, 257 Fed. 926;

Lackner v. McKechney, 2 Fed. (2), 516, cert. den. 267 U. S. 601; 69 L. Ed. 808;

Hall v. United States, 267 Fed. 795;

Gardner v. United States, 71 Fed. (2), 63 (9th C. C. of A.).

There can be no doubt that the findings and report in *Docket 16742* are sufficient evidence alone upon which to sustain the findings and decisions of the District Court.

CONCLUSION.

As stated in the foreword to our argument, there are only two principal questions presented to this court by the defendants in their Assignments of Error and Argument. These two questions are:

1. Were the awards of reparation in favor of plaintiffs jurisdictionally made by the Interstate Commerce Commission; and

2. Is the finding of unreasonableness made by the District Court as to the rates charged plaintiffs, supported by substantial evidence?

If the court decides these two questions in the affirmative, then the judgments of the Trial Court should be affirmed, and all of the errors asserted by defendants in the brief (pp. 11-14) will be disposed of, with the possible exception of No. 7, pertaining to the reasonableness of attorneys' fees allowed plaintiff by the Trial Court.

However, this matter of attorneys' fees was not urged by defendants in their argument. We take it, therefore, under the holdings of this court, that this assignment will not be considered. In addition there was ample testimony to support the finding of the Trial Court on this point (R. 225-230). The allowance of attorneys' fees is provided for by the Interstate Commerce Act, Section 16 (2), *49 U. S. C. A. 16 (2)*.

We believe the authorities cited, together with the reasons set forth in this brief, sustain in every detail the judgments of the Trial Court. We ask this court, therefore, to affirm the decisions of the District Court.

Respectfully submitted,

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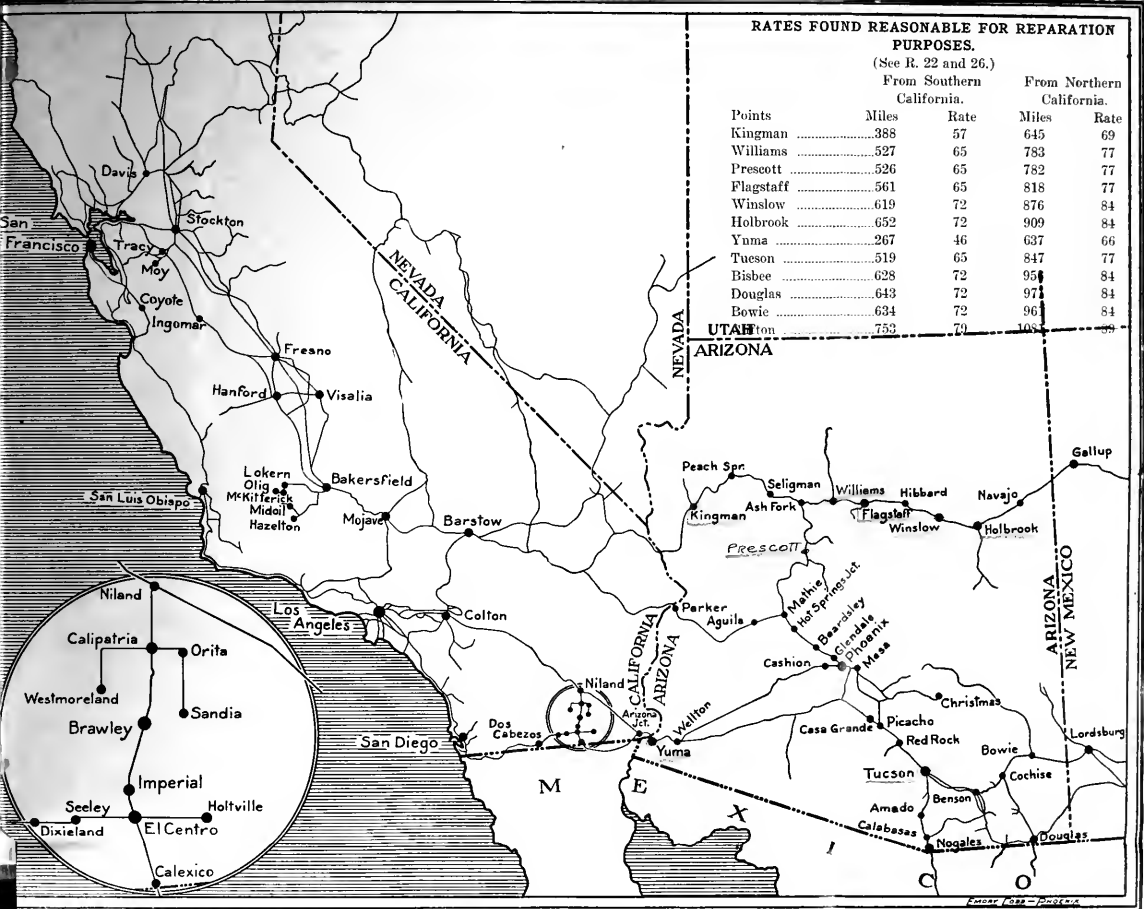
Attorneys for Plaintiffs and Appellees.

Dated, Phoenix, Arizona,
October 29, 1934.

Appendix


RATES FOUND REASONABLE FOR REPARATION PURPOSES.
(See R. 22 and 26.)
From Southern California.
From Northern California.
Points | Miles | Rate | Miles | Rate
Kingman 388 57 645 69
Williams 527 65 783 77
Prescott 526 65 782 77
Flagstaff 561 65 818 77
Winslow 619 72 876 84
Holbrook 652 72 909 84
Ynma 267 46 637 66
Tueson 519 65 847 77
Bisbee 628 72 956 84
Douglas 643 72 971 84
Bowie 634 72 961 84
753 79 1081 99
NEVADA
CALIFORNIA
UTAH
ARIZONA
Davis
Stockton
San Francisco
Tracy
Moy
Coyote
Ingomar
Fresno
Hanford
Visalia
Lokern
Olig
McKitterick
Midoil
Hazelton
Bakersfield
San Luis Obispo
Mojave
Barstow
Los Angeles
Colton
San Diego
Niland
Calipatria
Orita
Westmoreland
Sandia
Brawley
Imperial
Seeley
Holtville
Dixieland
El Centro
Calexico
Dos Cabezos
Niland
Arizona Jct.
Wellton
Yuma
CALIFORNIA
ARIZONA
Peach Spr.
Seligman
Williams
Hibbard
Navajo
Gallup
Kingman
Ash Fork
Flagstaff
Winslow
Holbrook
Prescott
Mathie
Hot Springs Jct.
Beardsley
Glendale
Phoenix
Mesa
Parker
Aguila
Cashion
Christmas
Casa Grande
Picacho
Red Rock
Lordsburg
Bowie
Tucson
Cochise
Benson
Amado
Calabasas
Nogales
Douglas
ARIZONA
NEW MEXICO
M E X I C O
EMORY COBB—PHOENIX